Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

D.L.S., INC., d/b/a DIAMONDS AND LACE SHOWBAR, a Tennessee Corporation; ANN MARTIN; KIM TYNDALL; and KAREN CHADWICK,

Petitioners,

v.

CITY OF CHATTANOOGA, TENNESSEE; and TENNESSEE ATTORNEY GENERAL CHARLES W. BURSON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE FRACTURED NATURE OF THE PLURALITY OPINION IN *BARNES v. GLEN THEATRE, INC.*, 501 U.S. 560 (1991), HAS CAUSED CONFLICT AMONG THE CIRCUIT COURTS AND STATE COURTS OF LAST RESORT IN REGARD TO WHICH OPINION IN *BARNES* CONSTITUTES IT'S "HOLDING"?

II. WHETHER THE LOWER COURTS DID NOT ADEQUATELY CONSIDER THAT, IN ADDITION TO CHALLENGING THE CONSTITUTIONALITY OF CHAPTER 542 AND TWO CHATTANOOGA CITY ORDINANCES, THE PETITIONERS' CASE INVOLVES A QUESTION AS TO WHETHER THE PASSAGE IN 1994 OF CHAPTER 542 EFFECTIVELY PREEMPTED LOCAL, MUNICIPAL LAWS AGAINST PUBLIC NUDITY?

III. WHETHER IT VIOLATED THE DUE PROCESS CLAUSE OF THE CONSTITUTION, THE FEDERAL "MULTIDISTRICT LITIGATION" STATUTE, AND THE RULES OF PROCEDURE OF THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION FOR THE TRANSFEREE COURT TO MISLEAD THE PETITIONERS AND THEN DISMISS THE PETITIONERS' CASE WITHOUT GIVING THE PETITIONERS A SINGLE OPPORTUNITY TO APPEAR BEFORE THE TRANSFEREE COURT?

LIST OF ALL PARTIES TO THE PROCEEDING & CORPORATE DISCLOSURE STATEMENT

The caption of the case contains the names of all the parties involved in this matter.

In response to Supreme Court Rule 29.6, there is no parent corporation or publicly held company owning 10% or more of the stock of D.L.S., Inc.

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CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS

U.S. District Court Judge R. Allan Edgar of the Eastern District of Tennessee entered a Memorandum and Order on October 12, 1995 (published as *DLS, Inc. v. City of Chattanooga*, 914 F. Supp. 193 (E.D. Tenn. 1995)). After the case was transferred to the U.S. District Court for the Middle District of Tennessee, District Court Judge Robert L. Echols entered a Memorandum and Order on September 30, 1996. In response to various motions filed thereafter, Judge Echols entered another Memorandum and Order on July 2, 1997. Following the filing of a timely notice of appeal, the U.S. Court of Appeals for the Sixth Circuit rendered its decision by way of an unreported per curiam opinion. All of the opinions, orders, and memorandums referenced in this paragraph are set forth in the appendix.

STATEMENT OF THE BASIS FOR JURISDICTION

The U.S. Court of Appeals for the Sixth Circuit issued its unreported per curiam opinion on January 13, 1999. However, the petitioners timely filed a petition for rehearing with suggestion for rehearing en banc, which was subsequently denied by the Sixth Circuit on March 18, 1999. The jurisdiction of this Honorable Court is invoked under 28 *U.S.C.* § 1254(1) and is timely according to Supreme Court Rule 13.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

The First Amendment to the U.S. Constitution in relevant part provides that "Congress shall make no law- . . . abridging the freedom of speech. . . . "

Section one of the Fourteenth Amendment to the U.S. Constitution in relevant part provides that " . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

28 *United States Code* § 1407(a) provides for the transfer of "civil actions involving one or more common questions of fact . . . for coordinated or consolidated pretrial proceedings" upon a determination by the Judicial Panel on Multidistrict Litigation that such transfer "will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions."

42 *United States Code* § 1983 in relevant part provides "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law. . . . "

Tennessee Code Annotated § 39-13-511 is fully set forth in the appendix to this petition.

Chattanooga City Code § 11-435 is fully set forth in the appendix to this petition.

Chattanooga City Code § 25-85 is fully set forth in the appendix to this petition.

STATEMENT OF THE CASE

This case originated in the U.S. District Court for the Eastern District of Tennessee, where it was filed as a result of the decision in an earlier, related case published as *D.L.S., Inc. v. City of Chattanooga*, 894 F. Supp. 1140 (E.D. Tenn. 1995). In this earlier case, U.S. District Court Judge R. Allan Edgar found some provisions of Chattanooga's "Adult-Oriented Establishment" ordinance, codified as *Chatt. City Code* § 11-421, et seq., unconstitutional, but upheld the City's then-newly enacted "six-foot rule" (as set forth in *Chatt. City Code* § 11-435(d)). [The Sixth Circuit later affirmed Judge Edgar's opinion in *D.L.S., Inc. v. City of Chattanooga*, 107 F.3d 403 (6th Cir. 1997)]. Notably, this earlier case did not involve any challenges against any anti-nudity laws or ordinances. *See, D.L.S., Inc. v. City of Chattanooga*, 894 F. Supp. at 1144 (noting that "this case is not about nude dancing"). *See, also, D.L.S., Inc. v. City of Chattanooga*, 107 F.3d 403, 407 (6th Cir. 1997).

Once Judge Edgar decided the six-foot distance rule between customers and entertainers during performances was constitutionally permissible, the petitioners concluded that the City's purported justifications for prohibiting nudity (i.e. health concerns and crime) were largely rendered moot. Consequently, on September 27, 1995,

approximately two and one-half months after Judge Edgar's decision in *D.L.S., Inc. v. City of Chattanooga*, 894 F. Supp. 1140 (E.D. Tenn. 1995), the petitioners filed the present lawsuit in the U.S. District Court for the Eastern District of Tennessee under 42 *U.S.C.* § 1983 challenging the constitutionality of the Tennessee Public Indecency Act (1994 Tenn. Pub. Acts, Chapter 542, codified at *Tenn. Code Ann.* § 39-13-511 – hereinafter called simply "Chapter 542"), and the anti-nudity provisions of the *Chattanooga City Code* as found in §§ 25-84, 25-85, 11-434(j), and 11-435(c). [At a subsequent TRO and Preliminary Injunction hearing, the City conceded that § 25-84 is not directed at nude dancing, while Judge Edgar noted that § 11-434(j) "only prescribes the contents of signs to be placed in adult-oriented establishments" and does not itself prohibit nude dancing. *DLS, Inc. v. City of Chattanooga*, 914 F. Supp. at 194. Therefore, as a practical matter, this present lawsuit only concerns constitutional challenges against Chapter 542 and *Chatt. City Code* § 25-85 and § 11-435(c).]

After hearing arguments of counsel concerning Chapter 542 and *Chatt. City Code* § 25-85 and § 11-435(c), Judge Edgar, through a Memorandum and Order, granted the petitioners' motion for preliminary injunction as to *Chatt. City Code* § 11-435(c), but denied the petitioners' motion for preliminary injunction as to *Chatt. City Code* § 25-85 (decision published as *DLS, Inc. v. City of Chattanooga*, 914 F. Supp. 193 (E.D. Tenn. 1995)). Judge Edgar's Memorandum and Order did not address Chapter 542, since, while denying the petitioners' motion for immediate transfer, he had recommended that "at least" the part of the case dealing with Chapter 542 be transferred to the

U.S. District Court for the Middle District of Tennessee in Nashville.

Because of the petitioners' cognizance of the similar proceedings that had already been consolidated and ongoing in Nashville as part of *MDL-1031*, the petitioners filed a "Motion for Immediate Transfer" at the same time they filed the present lawsuit. On October 12, 1995, Judge Edgar denied the petitioners' "Motion for Immediate Transfer" through a Memorandum and Order, which in part directed the parties to the appropriate rules governing multidistrict litigation. Through a letter dated October 23, 1995, the petitioners notified the Judicial Panel on Multidistrict Litigation (hereinafter "JPMDL") of a potential "tag-along action" to *MDL-1031* and asked to have the petitioners' case transferred to the Middle District of Tennessee. Thereafter, the JPMDL entered a "Conditional Transfer Order" on December 21, 1995, which was subsequently opposed by the respondents. Following briefing by all the parties and an oral argument hearing before the JPMDL on March 28, 1996, the JPMDL entered a final "Transfer Order" on April 11, 1996, transferring *D.L.S., Inc., et al. v. City of Chattanooga, et al.*, from the Eastern District of Tennessee (case # 195-cv-333) to the Middle District of Tennessee (case # 396-0372) so that it could be a part of *MDL-1031 – In re State of Tennessee Public Indecency Statute.* Despite this final "Transfer Order" by the JPMDL, the U.S. District Court for the Eastern District of Tennessee did not officially relinquish physical control of the case until entry of an Order on May 16, 1996.

After the petitioners received the final "Transfer Order" from the JPMDL, the petitioners waited a little while to see what if anything the U.S. District Court for

the Middle District of Tennessee would do with the case voluntarily to include the petitioners in the ongoing *MDL-1031* proceedings and/or to advise them as to how their case would be coordinated or consolidated with the other cases. Seeing nothing being done, the petitioners filed a "Motion by petitioners for Status Conference/Case Management Conference" on June 17, 1996. Not until July 30, 1996, though did the district court enter an Order granting the petitioners' motion for status conference/ case management conference, and setting a case management conference for August 26, 1996. Without explanation or prodding from any of the parties, the plaintiffs then received another Order dated August 16, 1996, rescheduling the case management conference for September 30, 1996. Later, and again for unknown and unspecified reasons, the court entered yet another Order on September 24, 1996, rescheduling the case management conference – this time setting it for October 21, 1996. However, just six days later and before the petitioners had even been given the opportunity to make an appearance, Judge Echols entered a Memorandum and Order dated September 30, 1996, which granted the City of Chattanooga's Motion to Dismiss and which simultaneously dismissed all of the other cases involved in *MDL-1031*.

Needless to say, this decision by Judge Echols was quite surprising to the petitioners since they had never filed a response to the motion to dismiss due to the uncertainty on the part of all parties and the court surrounding the jurisdiction of the U.S. District Court for the Eastern District of Tennessee to hear such a motion (considering that the conditional transfer order was then

pending before the JPMDL), and due to the pending case management conference in the U.S. District Court for the Middle District of Tennessee once the transfer order was finalized. Because of the surprise, the petitioners promptly filed a "Motion to reconsider and Motion for stay pending appeal". Not until July 2, 1997, did the court enter a Memorandum and Order denying the petitioners' motion to reconsider, but granting the petitioners' motion for stay pending appeal. Thereafter, the petitioners timely filed a Notice of Appeal – as did the plaintiffs in the other three cases consolidated with the petitioners' case in *MDL-1031*.

The U.S. Court of Appeals for the Sixth Circuit consolidated all four cases on appeal from *MDL-1031* before issuing an unreported per curiam opinion on January 13, 1999. The petitioners then filed a petition for rehearing with suggestion for rehearing en banc, which was subsequently denied by the Sixth Circuit on March 18, 1999.

For clarification, the petitioners D.L.S., Inc., et al. are referred to in this petition collectively as the "petitioners", while the respondents are referred to in this brief individually as either the "City" or the "State" or collectively as the "respondents".

ARGUMENT – REASONS FOR GRANTING THE WRIT

I. THE FRACTURED NATURE OF THE PLURALITY OPINION IN *BARNES v. GLEN THEATRE, INC.*, 501 U.S. 560 (1991), HAS CAUSED CONFLICT AMONG THE CIRCUIT COURTS AND STATE COURTS OF LAST RESORT IN REGARD TO WHICH OPINION IN *BARNES* CONSTITUTES ITS "HOLDING".

A. The *Barnes* Quandary

This case is related to another certiorari petition recently filed in this Court captioned *Deja Vu of Nashville, Inc., et al. v. Metropolitan Government of Nashville and Davidson County, Tennessee, et al.*, No. 98-1935. The petition in the *"Deja Vu"* case was predicated upon the fact that this Court had already granted certiorari in *Pap's A.M. v. City of Erie*, 719 A.2d 273 (Pa. 1998), to address the disputes in the inferior courts as to which opinion in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), represents the constitutional "holding" of that decision. Because this Court had already accepted review of a case to address this matter, the *Deja Vu* petition did not contain any detailed discussion of these disputes.

It has now been learned, however, that the respondent in *Pap's* has filed a motion with this Honorable Court seeking to dismiss the case as moot. If this Court grants that motion, the petitioners here and the petitioners in the *Deja Vu* case would respectfully request this Court to grant certiorari to resolve this conflict, which is illustrated as follows.

Resolution of the fundamental First Amendment issues at bar is predicated upon determining the constitutional "holding" of the highly fractured plurality decision

of *Barnes*. In *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129 (6th Cir. 1994), the Sixth Circuit noted that *Barnes* "provides little clear guidance for resolving the question of whether anti-nudity laws impermissibly infringe upon the First Amendment, and that attempting to discern a cogent legal standard from *Barnes* was akin to "reading [ ] tea leaves . . . ".[1] 40 F.3d at 133-34.

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[1] *See, also, Colacurcio v. City of Kent*, 163 F.3d 545, 549-550 (9th Cir. 1998) (there is "understandable confusion" about the level of constitutional protections that attach to nude dancing and the "fragmented nature of Supreme Court opinions" on these issues "has resulted in a lack of clear guidance on the level of First Amendment protection afforded to this type of expression"). Scholarship has also been generally uniformly critical of *Barnes*, either in regard to its fractured nature, or its analysis, or its ultimate holding (whatever that may ultimately be). *See, e.g., The Supreme Court-Leading Cases*, 105 Harv. L. Rev. 287 (1991); Zachary T. Fardon, Recent Development, *Barnes v. Glen Theatre, Inc.: Nude Dancing and the First Amendment Question*, 45 Vand. L. Rev. 237, 258-268 (1992); Ingrid K. Campagne, *Barnes v. Glen Theatre, Inc.: Application of Indiana's Public Indecency Statute to Nude Dancing – Is the Supreme Court Stripping Away First Amendment Protections to Reveal a New Standard?*, 25 Loy. L.A. L. Rev. 595, 610, 626 (1992); Melanie A. Martin, *Constitutional Law – Non-Traditional Forms of Expression Get No Protection: An Analysis of Nude Dancing Under Barnes v. Glen Theatre, Inc.*, 27 Wake Forest L. Rev. 1061, 1092-1103 (1992); Gianni Servodidio, Comment, *The Devaluation of Nonobscene Eroticism as a Form of Expression Protected by the First Amendment*, 67 Tul. L. Rev. 1231, 1249, 1255 (1993); Shannon M. Carlyle, Note, *Ban on Nude Dancing Strips Away First Amendment Rights to Protect "Order and Morality" in Barnes v. Glen Theatre, Inc.*, 19 Pepp. L. Rev. 1337, 1388-1394 (1992); Daniel Y. Hall, Note, *Stripping Away First Amendment Protection: Barnes v. Glen Theatre, Inc.*, 57 Mo. L. Rev. 629 (1992); Paul S. Saluja, Casenote, *Barnes v. Glen Theatre, Inc.: The Court's Moral Disapproval of Nude Dancing*, 18 Ohio N.U. L. Rev. 951 (1992); Sheldon Moss, Note,

Pursuant to the "narrowest grounds" rule for determining the holding of a plurality opinion as set forth in *Marks v. United States*, 430 U.S. 188 (1977), the Sixth Circuit stated that " . . . the *Marks* rule is less useful where, as here, ***no opinion, however narrowly construed, may be said to embody a position that enjoys the support of at least five Justices who concurred in the judgment.***" 40 F.3d at 134 (emphasis added). Regardless, the Sixth Circuit ultimately concluded that Justice Souter's concurring opinion, adopting a *Renton* "secondary effects" analysis utilizing intermediate scrutiny, represented the *Barnes* precedent. *Triplett Grille*, 40 F.3d at 134-35.

This should be contrasted with the recent ruling in *Pap's A.M. v. City of Erie*, 719 A.2d 273 (Pa. 1998), *rehearing denied, petition for cert. filed.* Observing numerous times that *Barnes* was "hopelessly fragmented" and that the "Court splintered and produced four separate, ***non-harmonious*** opinions" (*id.* at 276-77 – emphasis added), the Pennsylvania Supreme Court concluded that "[i]t is simply not possible to find that Justice Souter's position in *Barnes* commanded five votes." *Id.* at 278. Rather, it determined that strict scrutiny (using the *Barnes* dissent) was

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Constitutional Law: Stripping Nude Dancing of First Amendment Protection, 31 Washburn L. J. 618, 624, 628 (1992); Edward M. Urschel, Note, *Nude Dancing, Expressive Conduct, and the First Amendment: Reviewing Barnes v. Glen Theatre*, 20 Hastings Const. L.Q. 467, 481-82, 490-91 (1992); Timothy M. Tesluk, Comment, *Barnes v. Glen Theatre: Censorship? So What?*, 42 Case Western. Res. L. Rev. 1103 (1992); Teno A. West, Comment, *First Amendment Protections Stripped Bare: Barnes v. Glen Theatre, Inc.*, 27 New Eng. L. Rev. 475, 496-503 (1992).

the appropriate standard to apply, and invalidated the law in question. *Id.* at 279-280.

This should be contrasted with a scholarly analysis of the conflict between the Chief Justice's plurality opinion in *Barnes* and Justice Souter's concurrence therein, as set forth in *Nakatomi Investments, Inc. v. City of Schenectady*, 949 F. Supp. 988 (N.D.N.Y. 1997). Chief Judge Thomas McAvoy noted that Justice Souter's disagreement with the position of the Chief Justice that societal moral views could justify the regulation at issue there "casts doubt on the proposition that his concurrence articulated a sub set of the principles contained in the plurality opinion." *Id.* at 995. While, the district court observed, the interests of order and morality as discussed in the Chief Justice's plurality opinion were in fact furthered by directly banning the "evil" of nudity, there was no "logical relationship" which exists between the percentage of clothing worn by an entertainer and the occurrence of secondary effects.[2] *Id.* at 997-998, *citing Steverson v. City of Vicksburg*, 900 F. Supp. 1, 12 (S.D. Miss. 1994). The court thus concluded that Justice Souter's concurrence could not be the narrowest grounds under *Marks*, and that the Chief Justice's plurality opinion (requiring a "general law" banning ***all*** public nudity) was the appropriate controlling

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[2] *Accord, Pap's A.M.*, 719 A.2d at 280 (" . . . we also find it highly circuitous to prevent rape, prostitution, and other sex crimes by requiring a dancer in a legal establishment to wear pasties and a G-string before appearing on stage").

precedent of *Barnes*. *Nakatomi Investments*, 949 F. Supp. at 998.[3]

Accordingly, *Nakatomi Investments* follows the Chief Justice's three member plurality, *Triplett Grille* adopts Justice Souter's concurring opinion, and *Pap's A.M.* determines the *Barnes* dissent to be the controlling authority. Only Justice Scalia's lone concurrence has yet to find a following. The lack of direction for lower courts could not be any clearer and should persuade this Court to grant this petition.

In addition, while the majority of courts seem to be following *Triplett Grille*, the question of whether Justice Souter's concurring opinion represents the *Barnes* holding has become further clouded as a result of his recent strenuous dissent in *N.E.A. v. Finley*, 524 U.S. ___, 141 L.Ed.2d 500 (1998). There, this Court analyzed the constitutionality of a federal statute which required consideration of standards of decency when issuing grants for artistic works. At issue were various sexually explicit "performance art" routines, including a woman " . . . stripping to the waist and smearing chocolate on her breasts . . . ". 141 L.Ed.2d at 521 n.2 (Scalia, J., concurring in the judgment).

Justice Souter observed that sexual expression which is not obscene is entitled to ***"full protection"*** (i.e., subject

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[3] *See, also, Books, Inc. v. Pottawattamie County*, 978 F. Supp. 1247, 1256-57 (S.D. Iowa 1997) (public nudity law was a content-based regulation that sought to impermissibly distinguish nude dancing based on "their distasteful erotic message" and therefore the asserted government's interest in protecting "order and morality").

to strict scrutiny) under the Constitution, *id.* at 526-27, and that the protection of "artistic works" turns not on the message conveyed but "simply on their expressive character . . . ". *Id.* at 526. Significantly, he concluded that because "indecency" refers to "non-conformance with accepted standards of morality," the regulations at issue were "quintessentially viewpoint based . . . ", and that to "starve the mode [is to] starve the message." *Id.* at 528 (clarification added). Therefore, it appears that Justice Souter has again distanced himself from the Chief Justice's plurality opinion in *Barnes* (predicated upon the protection of the morality of society), which casts further confusion on the question of which opinion – or portion of opinion – is the precedential "holding" of that fractured decision. This Court should grant certiorari to provide badly needed direction to courts across the country that are regularly being required to adjudicate challenges to these types of laws.

B. The Existence of an Enforceable Distance Requirement Between Entertainers and Customers, Coupled with the Complete Absence of Alcohol on the Premises, Renders the Petitioners' Case Uniquely Well-Positioned for Resolution of the *Barnes* Quandary.

Included by implication within the petitioners' above comments regarding the so-called "*Barnes* Quandary" is the more fundamental question **whether nude dancing that occurs in adult-oriented establishments before consenting adults is entitled to any protection under the First and Fourteenth Amendments to the U.S. Constitution**. This more fundamental question is especially well-

suited for consideration and resolution by this Honorable Court because of two relatively unique factors present in the petitioners' case, which affect the constitutional balance employed in this area of analysis. First, as a result of the decision in *D.L.S., Inc. v. City of Chattanooga*, 107 F.3d 403 (6th Cir. 1997) (among other things upholding *Chatt. City Code* § 11-435(d) and its imposition of a six-foot distance requirement between entertainers and customers in an adult-oriented establishment during a performance), there now exists an enforceable six-foot buffer zone between entertainers and customers in Chattanooga. This alters the constitutional balancing scales toward the petitioners, since the presence of an enforceable six-foot rule essentially eliminates the concerns for which nudity in such establishments is allegedly directed, while simultaneously reducing the alleged crime concerns. In this regard, the court is undoubtedly aware that negative impacts on crime and health are two of the main (if not only) "secondary effects of public nudity" at which Chapter 542 and similar anti-nudity laws (including *Chatt. City Code* § 25-85 and § 11-435(c)) are supposedly based. As for alleged health concerns, it almost goes without saying that the asserted health concerns are drastically reduced (if not eliminated) by the enforceable presence of a six-foot buffer zone. *See, D.L.S., Inc. v. City of Chattanooga*, 107 F.3d at 412, footnote 10, where the Sixth Circuit noted that "[a]n officer of the Chattanooga Health Department [Dr. Valerie Boaz] testified at trial that . . . it would be more difficult for disease to be transmitted, if a six-foot distance requirement were in effect". As for alleged concerns with crime, the Sixth Circuit in *D.L.S., Inc. v. City of*

Chattanooga, 107 F.3d at 412-413, made the observation that:

> "the City [of Chattanooga] could reasonably have determined that the category of men who frequent a nightclub for the purpose of viewing near-nudity in close proximity – or for the purpose of physically touching the nearly nude – is more prone to crime than the category of men who do so for the purpose of viewing near-nudity from a distance".

Consequently, the enforceable presence of a six-foot buffer zone between entertainers and customers dramatically alters the legal analysis surrounding the constitutional validity of anti-nudity laws, both facially and as applied in Chattanooga, in favor of the petitioners. Second, the respondents' interests under the Twenty-first Amendment to the U.S. Constitution do not enter into consideration in this case since alcohol is not sold or even allowed on the premises of the petitioner, Diamonds & Lace Showbar. It is also important to note that there are no zoning issues involved in this case.

Therefore, by accepting the petitioners' case, this Honorable Court would be able to analyze the constitutionality of laws prohibiting nude dancing (i.e. address the *Barnes* quandary) without being burdened with or distracted by other factors often present in these kinds of cases such as criminal sexual contact, alcohol, or zoning.

C. Adoption and Incorporation of Related Petition

The petitioners adopt verbatim and incorporate by reference as though fully set forth herein the arguments

and authorities set forth in the "Petition for a Writ of Certiorari" that was recently filed in this Court in the related case captioned *Deja Vu of Nashville, Inc., et al. v. Metropolitan Government of Nashville and Davidson County, Tennessee, et al.*, No. 98-1935.

D. Even the Two District Courts Involved in This Case Are in Direct Conflict as to the Constitutionality of at least One of the Two Challenged Anti-Nudity Provisions of the *Chattanooga City Code*, Which are Facially Even More Constitutionally Infirm Than Chapter 542.

The arguments and authorities set forth in the "Petition for a Writ of Certiorari" that was recently filed in this Court in the related case captioned *Deja Vu of Nashville, Inc., et al. v. Metropolitan Government of Nashville and Davidson County, Tennessee, et al.*, No. 98-1935, reflect the numerous constitutional shortcomings of Chapter 542. However, the same arguments set forth against the unconstitutionality of Chapter 542 apply with even greater force against *Chatt. City Code* § 25-85 and § 11-435(c), since Chapter 542 at least contains some minimal, visible legislative efforts to limit its scope (even though again, as shown by this other petition, it too falls far short of constitutional requirements). For instance, while Chapter 542 at least attempts to exclude breast feeding mothers and nude modeling classes, neither *Chatt. City Code* § 25-85 nor § 11-435(c) contain essentially any exclusions.

The Sixth Circuit's per curiam opinion equating the challenged *Chattanooga City Code* sections with Chapter

542 is flawed in that, among other things, the only written, in depth judicial attention analyzing such laws found at least *Chatt. City Code* § 11-435 to be "unconstitutionally void for vagueness". In footnote two on page seven of its decision, the Sixth Circuit accepted the Middle District's conclusion that Chapter 542 and *Chatt. City Code* § 11-435(c) and § 25-85 essentially mirror one another and are thus constitutional to the same degree as Chapter 542. Yet this decision by the Sixth Circuit conflicts with an earlier detailed decision by Judge R. Allan Edgar of the Eastern District of Tennessee rendered before the case was ever transferred to the Middle District. In that earlier decision, published as *DLS, Inc. v. City of Chattanooga*, 914 F. Supp. 193 (E.D. Tenn. 1995), Judge Edgar granted the petitioners' motion for preliminary injunction as to *Chatt. City Code* § 11-435(c), but denied the motion for preliminary injunction as to *Chatt. City Code* § 25-85. [It is worth noting that Judge Edgar's decision did not address Chapter 542, since, while denying the petitioners' motion for immediate transfer, he had recommended that "at least" the part of the case dealing with Chapter 542 be transferred to the Middle District.] Judge Edgar granted the injunction against the enforcement of § 11-435(c) because, in Judge Edgar's opinion, *§ 11-435(c) was unconstitutionally "void for vagueness"* due to, among other things, the "somewhat Delphic" language describing violative conduct as that which "evince an attempt to arouse one's own sexual desires or those of someone else". *DLS, Inc. v. City of Chattanooga*, 914 F. Supp. at 197. Judge Edgar also observed that a nearly identical ordinance provision was held to have flunked the test set forth in *United States v. O'Brien*, 391 U.S. 367 (1968). *Id.* As for *Chatt. City Code*

§ 25-85, Judge Echols appeared to agree with Judge Edgar (*see, DLS, Inc. v. City of Chattanooga*, 914 F. Supp. at 196) in upholding § 25-85, and thus implicitly with the City's argument that *City of Chattanooga v. McCoy*, 645 S.W.2d 400 (Tenn. 1983), provides a limiting construction for *Chatt. City Code* § 25-85. Yet neither Judge Echols nor Judge Edgar considered important considerations taken into account by the district court in *Tolbert v. City of Memphis*, 568 F. Supp. 1285 (W.D. Tenn. 1983). In *Tolbert*, the court considered an identical ordinance to § 25-85 and found the ordinance to be both constitutionally overbroad and vague, and in the process explicitly refused to find a limiting construction out of the opinion in *City of Chattanooga v. McCoy*, 645 S.W.2d 400 (Tenn. 1983). In reaching its decision, the *Tolbert* court distinguished the findings in *McCoy* as dicta and based upon erroneous principles of law. The *Tolbert* court also noted that no First Amendment claim was made by the plaintiffs in *McCoy*, whereas the plaintiffs in *Tolbert* (and the present case as well) did. The *Tolbert* court also observed that the Tennessee Supreme Court in *McCoy* refused to allow the plaintiffs to raise overbreadth claims, which the plaintiffs in *Tolbert* (and the present case as well) did and were allowed to do.

The petitioners do not mean to suggest that they necessarily agree with Judge Edgar's decision relative to *Chatt. City Code* § 25-85, but rather simply desire to point out that Judge Edgar analyzed in some detail the two challenged city code sections and explained his belief why they were different, before striking one of them down and leaving the other to be enforced. This stands in

stark contrast to the decision by the Sixth Circuit, affirming Judge Echols on this issue merely in a passing footnote (*see* fn. 2), that Chapter 542 and *Chatt. City Code* § 11-435(c) and § 25-85 simply mirror one another and are thus all constitutional. At the least this conflict between district courts within the State of Tennessee suggests that the challenged city code sections are more deserving of written analysis than simply a passing footnote.

II. THE LOWER COURTS DID NOT ADEQUATELY CONSIDER THAT, IN ADDITION TO CHALLENGING THE CONSTITUTIONALITY OF CHAPTER 542 AND TWO CHATTANOOGA CITY ORDINANCES, THE PETITIONERS' CASE INVOLVES A QUESTION AS TO WHETHER THE PASSAGE IN 1994 OF CHAPTER 542 EFFECTIVELY PREEMPTED LOCAL, MUNICIPAL LAWS AGAINST PUBLIC NUDITY.

In a "Motion to Reconsider and Motion for Stay Pending Appeal", the petitioners advised the Middle District that its Memorandum and Order completely failed to address the petitioners' allegation that Chapter 542 effectively preempted local, municipal laws against public nudity. Recognizing this oversight, Judge Echols devoted three paragraphs (section II, pp. 7-8) of his later Memorandum to this issue. In doing so, Judge Echols acknowledged the court's failure to address the issue in its earlier Memorandum, but attempted to excuse such oversight on the basis that the issue "had not then been raised by any party". This statement is patently incorrect, since the petitioners had included such allegation in their Complaint (¶ 31), their Motion for TRO and Preliminary

Injunction (¶ 7), and repeatedly in various documents they submitted to the JPMDL.

Judge Echols begins the second paragraph relative to this issue by stating that "[h]ad that question been before the court, the Court would have looked to the intent of the Tennessee legislature regarding preemption". Yet, again, the question was clearly before the court, and the court's failure to conduct an inquiry into the legislative intent behind Chapter 542 relative to this issue was erroneous.

Judge Echols then goes on to close his discussion of the matter by citing several other Tennessee state statutes before concluding that "nothing in Chapter 542 [in the context meaning "on its face"] suggests that the Tennessee state legislature intended" to preempt local laws dealing with public nudity. The petitioners respectfully disagree with this conclusion. *Tenn. Code Ann.* § 39-13-511(a)(6) provides that "[t]his subsection shall not affect in any fashion the ability of local jurisdictions or the state of Tennessee to regulate any activity where alcoholic beverages, including malt beverages, are sold for consumption." On the very face of this statute, this statement arguably gives rise to a negative inference that this statute does expressly affect other related local laws not involving alcoholic beverages. Apart from this arguable express statement of intended preemption by the legislature, the petitioners alleged in their Complaint (¶ 31) that Chapter 542 represents a state scheme so pervasive as to make reasonable the inference that the legislature left no room for local municipalities to regulate the subject matter. This allegation should have been

more than sufficient to raise a genuine factual issue capable of surviving a motion to dismiss.

In short, as shown above, this was an issue that should not have even been addressed at all in the court's ruling on the City's motion to dismiss, but even if so, the issue was a genuinely disputed factual issue that was far more deserving than a passing thought or two in response to a motion to reconsider. Because the petitioners were not given the opportunity to appear before the district court, it is easy to see why the district court would make such an oversight. Nevertheless, had the petitioners been given an opportunity to appear before the district court, these errors might not have occurred.

Regardless of the reason, the district court's limited consideration of this issue appears more reasonable when compared with the manner in which the Sixth Circuit dealt with the issue. Specifically, the petitioners raised these very concerns to the Sixth Circuit in both their brief and petition for rehearing. Yet, the Sixth Circuit, for whatever reason, neglected to address the issue at all. Given these facts, this Honorable Court should exercise its supervisory authority to remedy this judicial neglect that has plagued the petitioners on this important issue.

III. IT VIOLATED THE DUE PROCESS CLAUSE OF THE CONSTITUTION, THE FEDERAL "MULTI-DISTRICT LITIGATION" STATUTE, AND THE RULES OF PROCEDURE OF THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION FOR THE TRANSFEREE COURT TO MISLEAD THE PETITIONERS AND THEN DISMISS THE PETITIONERS' CASE WITHOUT GIVING THE PETITIONERS A SINGLE OPPORTUNITY TO APPEAR BEFORE THE TRANSFEREE COURT.

Probably the most egregious procedural error befallen the petitioners is revealed by the fact that, once their case was transferred to the U.S. District Court for the Middle District of Tennessee to be a part of *MDL-1031*, the petitioners were never given *any* opportunity to appear or argue in the transferee court (i.e. the Middle District) before the court issued a full decision on the merits. That is, without giving the petitioners notice or an opportunity to defend themselves, the transferee court on its own initiative issued its decision.

The federal "Multidistrict Litigation" statute, found at 28 *U.S.C.* § 1407, provides for the transfer of civil actions "involving one or more common questions of fact . . . *for coordinated or consolidated pretrial proceedings.*" (emphasis added). Yet, put simply, there were never any "pretrial proceedings" at all in the transferee court involving the petitioners that were ever "coordinated or consolidated" as contemplated by 28 *U.S.C.* § 1407, or as envisioned by the JPMDL when the petitioners' case was ordered transferred pursuant to 28 *U.S.C.* § 1407(a).

Where the other cases involved in *MDL-1031* differed from the petitioners' case (i.e. the preemption of local

laws prohibiting nudity by Chapter 542, and the challenges to the two *Chattanooga City Code* sections), all the transferee court had to do was simply establish a separate discovery schedule for issues unique to the case at hand. (*See*, generally, *In Re: Equity Funding Corporation Litigation*, 391 F. Supp. 767 (JPMDL 1975). If the transferee court did not feel that the addition of the petitioners' case was appropriate or manageable, or that any of the proceedings in *MDL-1031* would benefit by the addition of the petitioners' case, then the transferee court had the right, and indeed the responsibility, under Rule 14 of the *Rules of Procedure of the Judicial Panel on Multidistrict Litigation* to request a remand.[4]

The petitioners raised these very concerns to Judge Echols in their "Motion to Reconsider and Motion for Stay Pending Appeal". Judge Echols attempted to address

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[4] But *see* generally, *In Re: Koratron Patent Litigation*, 327 F. Supp. 559 (JPMDL 1971) (where the defendant's motion to vacate conditional transfer order was denied despite the fact that the defendant might be handicapped because it had not participated in earlier discovery in the transferee court – the difficulties imposed on the defendant by the transfer of the tag-along case after discovery has begun in transferee court were outweighed by the benefits of centralized management of pretrial proceedings, and the failure to transfer could result in the type of duplicative discovery which original transfer was intended to prevent); *see, also, In Re: Molinaro/Catanzaro Patent Litigation*, 380 F. Supp. 794 (JPMDL 1974) (where JPMDL transferred actions even though extensive discovery had already been conducted in action pending there, due in part to the familiarity of transferee judge with issues and discovery which would enable him to tailor pretrial program to fit the needs of other defendants and process transferred actions quickly and efficiently).

these concerns in four paragraphs (section I.B, pp. 5-7) of his later Memorandum. In the first paragraph, Judge Echols labels the petitioners' arguments as amounting to allegations of "surprise" within the meaning of Rule 60(b) of the *Federal Rules of Civil Procedure*. While Judge Echols may be correct in this characterization of the argument, the court's inherent equitable powers should also provide appropriate grounds for relief. In the second paragraph, Judge Echols essentially responded to the petitioners' arguments by saying what amounted to "tough luck" – the petitioners were the ones who had asked for the case to be transferred knowing that the other cases in *MDL-1031* had already procedurally advanced much further. The fallacy in this position demands correction. Again, if the transferee court did not feel that the addition of the petitioners' case was appropriate or manageable, or that the proceedings in *MDL-1031* would be unduly hindered by the addition of the petitioners' case, then the transferee court had the obligation under Rule 14 of the *Rules of Procedure of the Judicial Panel on Multidistrict Litigation* to request a remand – not to simply punish the petitioners or to blame them for having their case transferred at a later stage than these other cases. The third paragraph stands as a partial testament as to the petitioners' arguments. That is, Judge Echols states that the petitioners were on notice of the various, pending summary judgment motions, including one by the respondents. As shown above, this is incorrect for two reasons: (1) the petitioners' case only involved a pending motion to dismiss (not summary judgment), and (2) the motion to dismiss was filed only by the City of Chattanooga, not by the State. These erroneous statements by Judge Echols

reflect confusion brought about presumably because the petitioners were never given an opportunity to appear before the transferee court. Finally, the fourth paragraph concludes Judge Echols' discussion of this argument by, in essence, restating what has already been said and adding that the petitioners had "over five months" to respond, or from April 11, 1996, when the petitioners' case was transferred to the Middle District, until September 30, 1996, when summary judgment was granted. Again though, what the petitioners were after during this time period was some direction from the transferee court as to what course of proceedings the petitioners' case should follow, including for, example, if the transferee court would consider (i.e. assume jurisdiction over) the City's Motion to Dismiss that was filed in the Eastern District. Given the complicated nature of multidistrict litigation coupled with the actions of the petitioners in trying to get a case management conference hearing, surely the actions of the petitioners in failing to respond was not inexcusable. Moreover, of the "over five months" delay to which Judge Echols makes reference, the Eastern District maintained physical custody of the file from the entry by the JPMDL of the final "Transfer Order" on April 11, 1996, until mid-May. Also, from mid-June when the petitioners filed their motion for a status conference/ case management conference until late September when Judge Echols filed his initial Memorandum and Order, the petitioners were deceived into thinking that Judge Echols would advise them regarding his procedural preferences for the petitioners' case (*see* the three Orders in the appendix). Thus the only delay that can somewhat be attributable to the petitioners is one month – from mid-

May until the petitioners filed their motion for a status conference/case management conference in mid-June. The fact that the petitioners asked for a "status conference" corroborates the very essence of the petitioners' claims of good-faith uncertainty concerning how the transferee court would want them to proceed following the transfer of their case.

Unfortunately the Sixth Circuit not only failed to appreciate the seriousness of this issue, but it failed to address the issue at all. The closest the Sixth Circuit even got to this issue was on page three of the Sixth Circuit's decision, first full paragraph, where it stated that "oral arguments on the [dispositive] motions were heard on March 25". As the facts reveal though, that simply is not true for the petitioners.

According to 28 *U.S.C.* § 1407(a), a case will only be transferred upon a determination by the JPMDL that such transfer "will be for the convenience of parties and witnesses and will promote the *just and efficient* conduct of such actions." While the transferee court's action in dismissing the petitioners' case was definitely "efficient", there is certainly nothing "just" about a transferee court (or any district court for that matter) granting a motion for a case management conference, then rescheduling the conference twice, and then dismissing the petitioners' lawsuit entirely without notice or a hearing – and just six days after the second rescheduling of the case management conference.

Because the actions of the transferee court were unduly misleading, and because the rendering of such a decision without giving the petitioners an opportunity to

present their case before the transferee court was patently unfair and unjust, the petitioners' rights to due process under the Fourteenth Amendment to the U.S. Constitution as well as the federal statute and rules governing multidistrict litigation were violated. Fundamental concerns for equity and fairness in the treatment of any litigant should compel this Honorable Court to utilize its supervisory power and correct this miscarriage of justice.

CONCLUSION

This petition for a writ of certiorari should be granted in order to resolve the conflict and uncertainty among inferior courts across the nation as to the correct "holding" in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), and to resolve the other important issues set forth in this petition and in the related petition filed in *Deja Vu of Nashville, Inc., et al. v. Metropolitan Government of Nashville and Davidson County, Tennessee, et al.*, No. 98-1935.

Respectfully submitted,

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NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Nos. 96-6512, 96-6573, 97-5924, 97-5938

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: STATE OF TENNESSEE PUBLIC INDECENCY STATUTE.

DEJA VU, et al.,

Plaintiffs-Appellants,

v.

METRO GOVERNMENT, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

(Filed Jan. 13, 1999)

BEFORE: MARTIN, Chief Judge, NORRIS and BATCHELDER, Circuit Judges.

PER CURIAM. Various dancers, managers, or owners engaged in the exhibition of nude and/or semi-nude dancing in Tennessee challenge the district court's grant of summary judgment to local and state governing bodies and officials in their actions alleging the Tennessee Public Indecency Statute, Chapter 542, violates the United States Constitution. We hold that Chapter 542 does not restrict speech based on a disagreement with the message it conveys in violation of the Constitution, but is instead aimed with adequate precision at combating secondary crime effects. We therefore affirm the district court.

On July 1, 1994, the Tennessee state legislature passed Chapter 542 of the Public Acts of 1994. Tenn. Code Ann. § 39-13-511 (Supp. 1995). Chapter 542 prohibited

certain forms of public nudity and other conduct related to public indecency. Two weeks prior, on June 14, Plaintiffs Deja Vu of Nashville, Inc., et al., had sought to enjoin enforcement of Chapter 542 in the United States District Court for the Middle District of Tennessee. This motion for preliminary injunction and temporary restraining order was denied on July 1. On that same day, plaintiffs from Memphis filed suit in state circuit court against the city of Memphis, also challenging the constitutionality of Chapter 542. On July 21, their case was removed to the United States District Court for the Western District of Tennessee. On July 11, plaintiffs James Corbett Chick, et al., filed suit in state circuit court in Nashville, seeking to enjoin enforcement of Chapter 542. On July 18, the case filed by the Chick plaintiffs was removed, pursuant to defendants' motion, to the United States District Court for the Middle District of Tennessee.

On November 2, the Judicial Panel on Multidistrict Litigation transferred the Memphis plaintiffs' suit to the Middle District of Tennessee and consolidated it with the case filed by the Deja Vu plaintiffs. On January 5, 1995, the suit filed by the Chick plaintiffs was also consolidated with the above cases as a "tag-along action."

On September 27, DLS, Inc., et al. filed suit against the city of Chattanooga in the Eastern District of Tennessee, also seeking to enjoin Chapter 542's enforcement as well as Chattanooga City Code provisions that served to regulate public nudity. The Chattanooga plaintiffs' motion for summary judgment was denied on October 12. On April 11, 1996, the case was transferred to the Middle District of Tennessee and consolidated with the above-mentioned cases. Prior to this, on January 10, this Court

reversed the district court's July 1, 1994 denial of the Deja Vu plaintiffs' motion for a preliminary injunction or temporary restraining order and sent the case back to the district court. *Deja Vu of Nashville, Inc. v. Metropolitan Gov't of Nashville*, 74 F.3d 1240, 1996 WL 11061 (6th Cir. Tenn. (Jan. 10 1996)) (unpublished opinion).

Cross-motions for summary judgment and/or to dismiss were filed by the parties and oral arguments on the motions were heard on March 25. On September 30, the district court granted summary judgment to the Deja Vu, Memphis, and Chick defendants, and dismissed the Chattanooga plaintiffs' claims.

On October 16, the plaintiffs filed a motion for stay pending appeal to continue the preliminary injunction entered by this Court. On July 2, the district court granted the motion for stay. All plaintiffs then filed timely notices of appeal. On appeal, they have all adopted and incorporated one another's arguments in regard to the constitutionality of Chapter 542.

This Court reviews a district court's grant of summary judgment *de novo*. *Borda v. Hardy, Lewis, Pollard & Page, P.C.*, 138 F.3d 1062, 1068 (6th Cir. 1998). Plaintiffs' principal contention is that Chapter 542 violates the First Amendment right to freedom of expression. The threshold determination in deciding if a statute complies with the First Amendment guarantee of freedom of expression is whether the statute is a content neutral time, place, and manner restriction or content based restriction and therefore subject to a strict scrutiny analysis and presumptively violative of the First Amendment. *See Boos v. Barry*, 485 U.S. 312, 321 (1988). Whether a statute that restricts

free speech is content neutral is largely resolved by determining whether the government enacted the statute because it disagrees with the message conveyed by the speech. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 295 (1984)).

The preamble to Chapter 542 plainly provides that Chapter 542 was enacted to combat the secondary effects of nude dancing establishments such as sexual assault, prostitution, and other criminal activity. "[C]ontrolling precedent establishes that the goals of crime and disease prevention are content-neutral." *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 411 (6th Cir. 1997) *(reh'g en banc denied)*. Because Chapter 542 is fueled by the motivation of curbing the associated criminal effects of nude dancing it is content neutral.

Having determined that Chapter 542 is content neutral, the focus now turns to the question of how to appropriately analyze the ordinance to determine its constitutionality. As stated by this Court in *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 134 (6th Cir. 1994), in order to determine whether a content-neutral statute violates the First Amendment guarantee of freedom of expression it is proper to follow Justice Souter's concurring opinion in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991). In *Barnes*, Justice Souter adopted the four-part test developed in *United States v. O'Brien*, 391 U.S. 367, 377 (1968), which provides that a statute is constitutionally valid if it is within the constitutional power of government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental

restriction on First Amendment freedom is no greater than is essential to the furtherance of that interest.

Justice Souter asserted that, in applying the four-part *O'Brien* test, a governmental interest in enacting the statute to combat associated criminal activity will serve to meet the four prongs and, in turn, justify enforcing the ordinance. *See Barnes*, 501 U.S. at 583. This is not to say, however, that affirmative evidence of a secondary effects motivation is necessary. *See Triplett Grille, Inc.*, 40 F.3d at 135. The "appropriate focus" is instead "the existence or not of a current governmental interest in the service of which the challenged application of the statute may be constitutional." *Barnes*, 501 U.S. at 582 (citing *McGovern v. Maryland*, 366 U.S. 420 (1961)).

Turning to the first prong of the *O'Brien* test with this reasoning in mind, plaintiffs claim that enactment of Chapter 542 was not within the constitutional power of the State of Tennessee. However, prevention of offenses such as sexual assault, prostitution, and other crime-related activity does fall within the constitutional power of the state. *See Barnes*, 501 U.S. at 583. As the deterrence of such evils is precisely the goal of Chapter 542, it therefore easily meets the first prong of *O'Brien*.

The second prong addresses whether the statute furthers an important or substantial government interest. *See O'Brien*, 391 U.S. at 377. While prevention of crime is doubtless a substantial government interest, a question arises whether Chapter 542 does, in fact, further that interest. Plaintiffs contend that Chapter 542 does not state with specificity the impact it will have and therefore lacks the appropriate designation of how it will prevent crime.

However, as provided in *Renton*, the government is not required to produce research that identifies the exact causation between the restricted activity and the targeted secondary effects. *Id.* at 51. The type of restricted activity present in Chapter 542 is nearly identical to that in *Barnes*. And, as Justice Souter provided in his concurring opinion in *Barnes*, it does not require a "leap" to surmise that entertainment such as totally nude dancing is "likely to produce the same pernicious secondary effects as the adult films . . . at issue in *Renton*." *Barnes*, 501 U.S. at 584. Chapter 542 therefore adequately furthers the government interest of preventing crime associated with nude dancing establishments and accordingly meets the second prong of the four-prong *O'Brien* test.

Satisfying the third prong of *O'Brien* is accomplished via answering the above discussion regarding Chapter 542's content neutrality. Determining content-neutrality is akin to determining whether the statute is unrelated to the suppression of free expression. *See Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 (1984). As Chapter 542, as discussed above, is content-neutral, the third prong is also met.

The fourth and final prong under an *O'Brien* analysis, whether the restriction is no greater then [sic] necessary to further the government interest, can again be analyzed within the context of Justice Souter's concurrence in *Barnes*. As in *Barnes*, Chapter 542, while moderating expression to some extent by disallowing certain forms of public nudity, still allows for considerable "capacity and opportunity to express the erotic message." *Id.* at 587. The

fourth prong of the *O'Brien* test is therefore met. It follows that because Chapter 542 is a content-neutral restriction on free speech that meets all four prongs of the *O'Brien* test and thereby comports with the tenets of *Barnes*, it does not violate the First Amendment right to freedom of expression.[1]

The Chattanooga plaintiffs attempt to differentiate their case from the other plaintiffs' when attacking Chapter 542 on freedom of expression grounds. They argue that because they are also subjected to a Chattanooga City Ordinance that, unlike Chapter 542, has a six-foot buffer zone restriction (via Judge Boggs's decision in *DLS, Inc.*, 107 F.3d at 403), and forbids alcohol consumption, Chapter 542 no longer combats any link between the nude dancing at their clubs and secondary crime effects. This argument ignores the seminal point that, while the possibility of disease may be diminished due to an increased distance between dancer and patron and that a lack of alcohol may reduce violence, the associated crime effects still exist. The Chattanooga plaintiffs do not enjoy a more formidable challenge to Chapter 542's constitutionality.[2]

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[1] Plaintiffs also alleged that Chapter 542 violates the Tennessee Constitution's guarantee of free communication. However, the Tennessee Constitution does not provide any greater protection for nude dancing as a form of expression, and therefore is subjected to the same analysis as for the United States Constitution. It is therefore also not violated by Chapter 542.

[2] The Chattanooga plaintiffs also challenged the constitutionality of Chattanooga City Ordinance § 25-85 and § 11-435(c) on the same grounds that Chapter 542 was

All plaintiffs further maintain that Chapter 542 is void for vagueness. An ordinance is void for vagueness if a person of ordinary intelligence cannot reasonably interpret what is prohibited. *Grayned,* 408 U.S. at 108. Plaintiffs point specifically to Chapter 542's inclusion of "theatrical production" as an activity exempt from its prohibitions. Although a definition is not provided for "theatrical production," the district court correctly concluded that this exception was not vague because it derives its definition via reference to the Tennessee Obscenity Statute. Tenn. Code Ann. § 39-17-9. Any confusion is further cleared up by applying the obscenity standard for theatrical productions as provided in *Miller v. California,* 413 U.S. 15 (1973).

Plaintiffs add that the "theatrical production" exception's reference to "serious artistic merit" renders it vague. They contend specifically that this phrase does not comply with the three-prong obscenity standard as provided in *Miller* because *Miller* refers to "serious value" as opposed to Chapter 542's reference to "serious artistic merit." In responding to such an analogy it must be kept in mind that for a statute to be vague it must contain "terms so vague that men of common intelligence must necessarily guess at its common meaning." *Connally v. General Const. Co.,* 269 U.S. 385, 391 (1926). The lack of exact uniformity between the two phrases certainly does not require such guess-work and the exception is therefore not vague.

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challenged by all plaintiffs. However, as correctly stated by the district court, the Chattanooga City Ordinance and Chapter 542 essentially mirror one another. Therefore these claims of unconstitutionality likewise fail.

In asserting that Chapter 542 is vague, plaintiffs also refer to the provided definition of "public place" as well as for the listed exceptions such as for modeling classes, family-oriented clothing-optional facilities, and temporary premises used as private residence. However, when the meaning of a word or phrase is commonly understood, a statute's failure to define the term will not render the statute void for vagueness. *See United States v. J.T. Haun*, 90 F.3d 1096, 1101 (6th Cir. 1996). The statute need not define with mathematical precision the conduct forbidden. *See Columbia Natural Resources, Inc. v. Tatum*, 58 F.3d 1101, 1108 (6th Cir. 1995). Chapter 542's terms comply with this minimum degree of definiteness and therefore do not render it unconstitutionally vague.[3]

Plaintiffs argue that Chapter 542 is also overbroad. A statute is overbroad when there exists "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." *Triplett Grille, Inc.*, 40 F.3d at 135 (quoting *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U. S. 789, 801 (1984)). In *Triplett*, this Court did strike down an ordinance under the First Amendment overbreadth doctrine because it banned "all public nudity, including live performances with serious literary, artistic, or political value." *Id.* at 136. It included no limiting provisions and swept "within its ambit expressive conduct not generally associated with prostitution, sexual assault, or other

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[3] Chapter 542 even lists extensive examples of what is meant by "public place."

crimes." *Id.* Absent such limitations, much of the prohibited conduct did not properly provide a link to the associated harmful effects. Chapter 542 avoids such an overbreadth problem by containing these very limitations and exclusions the plaintiffs claim render Chapter 542 vague. Chapter 542 therefore does provide a bridge between the banned activity and the secondary effects.[4]

The district court's grant of summary judgment to the defendants is affirmed.

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[4] Plaintiffs additionally contend that Chapter 542 violates the Equal Protection Clause and the substantive Due Process Clause. U.S. Const. amend. XIV. These arguments also fail. Chapter 542 does not, by creating the above-mentioned exemptions, establish a "suspect class" based on a distaste for the form of expression in violation of the Equal Protection Clause. The exemptions instead serve to evince that Chapter 542 only targets nudity that yields an association with secondary crime effects. *See DLS, Inc.*, 107 F.3d at 411. Chapter 542 also does not violate the Due Process Clause as it makes clear all of the elements necessary for an employer to be held liable for the conduct of his employees. Although Chapter 542 does not contain the specific phrase "within the scope of employment" it does include the phrase "while working as an employee." It therefore provides fair warning to employers regarding their liability. *See Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

IN RE STATE OF TENNESSEE PUBLIC INDECENCY STATUTE LITIGATION, STATES DISTRICT COURT	))))	MDL Docket No. 1031 All Cases Judge Echols

MEMORANDUM

(Docketed July 2, 1997)

Pending before the Court are certain motions filed by some of the Plaintiffs In Re State of Tennessee Public Indecency Statute Litigation (Case No. 3-94-MD-1031), to which Defendants have responded.[1] This litigation has been transferred to this Court under 28 U.S.C. § 1407, which provides for consolidation in multi-district litigation. The pending motions are listed below:

(1) *DLS, Inc., et al. (hereinafter, "Chattanooga Plaintiffs") v. City of Chattanooga, et al.*, M.D. Tenn., Case No. 3-96-0372; Motion by Chattanooga Plaintiffs to Reconsider and Motion for Stay Pending Appeal (MDL Docket Entry No. 106);

(2) *Deja Vu of Nashville, Inc., et al. (hereinafter "Nashville Plaintiffs") v. Metropolitan Government of Nashville and Davidson County, Tennessee, et al.*, M.D. Tenn., Case No. 3-94-0494; *Steve Cooper, et al. (hereinafter "Memphis Plaintiffs") v. City of Memphis, et al.*, W.D. Tenn.,

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[1] Parties and procedural history are discussed fully in this Court's Memorandum of September 30, 1996.

Case No. 94-CV-2590; *James Corbett Chick, d/b/a The Brass Stables, C & A Entertainment, Inc., and Dawn Pierce (hereinafter "Chick Plaintiffs") v. The Metropolitan Government of Nashville and Davidson County, Tennessee, and Robert E. Kirchner, Jr.*, M.D. Tenn., 3-94-0571; *James Green, d/b/a Doll House and Lee McDerman, d/b/a/ Treasures (hereinafter, "Jackson Tag-Along Plaintiffs") v. Weakley County, et al.;* Motion by Nashville Plaintiffs, Memphis Plaintiffs, Chick Plaintiffs, and Jackson Tag-Along Plaintiffs for Stay Pending Appeal (MDL Docket Entry No. 109);

(3) *Deja Vu of Nashville, Inc., et al. v. Metropolitan Government of Nashville and Davidson County, Tennessee, et al.*, M.D. Tennessee, No. 3-94-0494; Motion by Nashville Plaintiffs for Relief from judgment Regarding Amended Complaint (MDL Docket Entry No. 107); and

(4) Memphis Plaintiffs' Motion for Entry of Final Order (MDL Docket Entry No. 122).

I. Chattanooga Plaintiffs' Motion to Reconsider

The Chattanooga Plaintiffs have filed a Motion to Reconsider, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure Under Rule 60(b), a court may grant relief from an order, on motion and upon such terms as are just, for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) the discovery of new evidence; (3) fraud, misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged;

or (6) relief is otherwise justified. Plaintiff's Motion suggests two grounds upon which a Court could grant relief: mistake or surprise.

A. Was the Court "Mistaken" in Granting Summary Judgment in MDL 1031?

The Chattanooga Plaintiffs contend that this Court violated the federal Multidistrict Litigation Statute, 28 U.S.C. § 1407, by rendering summary judgment in lieu of providing "coordinated or consolidated pretrial proceedings." Rule 14 of this statute, however, contempiates that district courts may grant summary judgment as part of such proceedings: "actions terminated in the transferee district court by valid judgment, including but not limited to summary judgment, . . . shall not be remanded by the Panel and shall be dismissed by the transferee district court." Multidist. Lit. Rule 14.

As confirmed by a number of other decisions, the transferee court is empowered to enter dispositive pretrial orders terminating the case. *In re Donald J. Trump Casino Securities Litigation-Taj Majal Litigation*, 7 F.3d 357 (3d Cir. 1993), *cert. denied*, 510 U.S. 1178 (1994). Section 1407 is intended to grant to the transferee court the power to rule on all pretrial motions, including motions for summary judgment. *Kaiser Industries, Corp. v. Wheeling-Pittsburgh Steel Corp.*, 328 F. Supp. 365 (D. Del. 1971). Once a case has been transferred by the Multidistrict Litigation Panel, the transferee court assumes complete jurisdiction for pretrial purposes and has the authority to settle all dispositive motions, such as those for summary judgment. *In re Agent Orange Product Liability Litigation*,

597 F. Supp. 740 (E.D.N.Y. 1984), *aff'd* 818 F.2d 145 (2d Cir. 1987), *cert. denied by Pinkney v. Dow Chemical Co.*, 484 U.S. 1004 (1988).

The Sixth Circuit has held that a transferee court, under order of the Multidistrict Litigation Panel, has the power to decide motions for summary judgment in a case which has been transferred for the limited purpose of coordinated or consolidated pretrial proceedings. *Humphreys v. Tann*, 487 F.2d 666 (6th Cir. 1973), *cert. denied*, 416 U.S. 956 (1974).

Clearly, under 28 U.S.C. § 1407, district courts may grant summary judgment in consolidated multidistrict cases under the same guidelines which allow summary judgment in non-consolidated cases. The plain language of the statute, annotations to the statute, and case law based on the statute are in accord on this point.

A party may obtain summary judgment if the evidentiary material on file shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

This Court, for more than two and a half years, has received motions, exhibits, and voluminous filings and legal briefs concerning Chapter 542, the adult entertainment industry and the effects of public nudity.[2] Representative Plaintiffs and Defendants filed cross-motions for

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[2] This Court issued its first ruling on Chapter 542 on July 1, 1994, when it denied the preliminary injunction sought by the Nashville plaintiffs. On November 2, 1994, the Memphis Plaintiffs' case was transferred to this Court for "coordinated or consolidated pretrial proceedings." In re State of Tennessee

summary judgment requesting the case be dismissed based upon the legal issues raised. The Court carefully reviewed the pleadings, affidavits, and the supporting materials submitted, along with the applicable law, and has concluded there is no genuine issue of material fact concerning whether the new state statute violated constitutional protections. This Court is of the opinion its initial decision on this subject, was correct and it had the power to grant summary judgment in favor of the Defendants under 28 U.S.C. § 1407. After reconsideration, the Court reaffirms its prior order upholding the constitutionality of the statute (Charter 542) and on the issues it considered at the summary judgment stage.[3]

B. Was There Unfair "Surprise" in the Court's Granting Summary Judgment in MDL 1031?

The Chattanooga Plaintiffs argue this Court's ruling in MDL 1031 constituted "surprise" within the meaning of Fed. R. Civ. P. 60(b), as the Order issued "entirely without notice or a hearing."

Public Indecency Statute Litigation. MDL 1031 (J.P.M.L. filed Nov. 8, 1994) (hereinafter "MDL 1031"). The Chick Plaintiffs' case was consolidated with MDL 1031 as a tag-along action on January 5, 1995; the Weakley County and Jackson Plaintiffs' cases were transferred to this Court on August 2, 1955; and the Chattanooga Plaintiffs became part of MDL 1031, on April 11, 1996.

[3] However, as discussed herein at Section IV, the Court finds that it erroneously granted summary judgment in favor of the Defendants on Nashville Plaintiffs, Complaint without addressing the additional request for a declaratory judgment contained in Nashville Plaintiff's Amended Complaint.

The Court notes it was Chattanooga Plaintiffs who effected the consolidation of the Chattanooga litigation with other pending litigation concerning Chapter 542, and that Chattanooga Plaintiffs did so even though the Chapter 542 litigation before the Court at that time had progressed much further than the Chattanooga litigation.[4]

The Court further notes that Chattanooga Plaintiffs were on notice of Motions for Summary Judgment filed by Nashville Plaintiffs,[5] Chick Plaintiffs,[6] Memphis Plaintiffs,[7] Jackson Plaintiffs,[8] Nashville Defendants,[9] Chick Defendants,[10] Memphis Defendants 1,[11] Memphis Defendants 2,[12] Weakley County Defendants,[13] and Chattanooga Defendants.[14]

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[4] See Plaintiffs' Response to the Motion to Vacate the Conditional Transfer Order filed before the Judicial Panel of Multidistrict Litigation on or about March 12, 1996.

[5] Filed in case number 3-94-MD-1031, Docket Entry No. 40.

[6] Filed in case number 3-94-MD-1031, Docket Entry No. 44.

[7] Filed in case number 3-94-MD-1031, Docket Entry No. 35.

[8] Filed in case number 3-94-MD-1031, Docket Entry No. 45.

[9] Originally filed in case number 3-94-0490, Docket Entry No. 30.

[10] Originally filed in case number 3-94-0490, Docket Entry No. 18.

[11] Filed in case number 3-94-0990, Docket Entry No. 0. Defendants' Motion was originally filed in the Western District of Tennessee in case number 94-CV-2590. The docket entry number assigned to Defendants' Motion in that case was Docket Entry No. 25.

[12] Filed in case number 3-94-MD-1031, Docket Entry No. 26.

[13] Filed in case number 3-94-MD-1031, Docket Entry No. 27.

[14] Originally filed in case number 3-96-0372, Docket Entry No. 21.

Furthermore, the Court notes that Chattanooga Plaintiffs had over five months to submit briefs responding to these motions, from April 11, 1996, when the Chattanooga case was transferred to this Court, until September 30, 1996, when summary judgment was granted. Considering Chattanooga Plaintiffs' active desire to join other Plaintiffs in this case, the notice provided by the record that cross-motions for summary judgment were pending before the Court and that arguments had been heard on the dispositive motion, and the opportunity Chattanooga Plaintiffs had to submit brief's regarding genuine issues of material fact, this Court concludes Chattanooga Plaintiffs were not "surprised" under Fed. R. Civ. P. 60(b).

II. The Chattanooga Plaintiffs' Preemption Argument

The Chattanooga Plaintiffs suggest that this Court failed to address the question of whether Chapter 542 effectively preempted local laws against public nudity. Indeed, this Court's Memorandum regarding the constitutionality of Chapter 542 is silent on that question, which had not then been raised by any party.

Had that question been before the Court, the Court would have looked to the intent of the Tennessee legislature regarding preemption. The Tennessee Code anticipates that municipalities will adopt ordinances, and provides a general grant of power to municipal governments to adopt municipal codes. T-C.A. § 6-54-508. With regard to statutes relating to public morals, state law provides that municipalities shall both enforce state law and "tak[e] such other proceedings against such violators

as may be authorized and provided by the ordinances of such municipalities." 11 T.C.A. § 6-54-401.

Where the Tennessee legislature intends for state law to preempt local authority to enact legislation, the applicable statute expressly indicates preemption. For example, T.C.A. § 39-17-509 specifically preempts local governments from regulating offenses for gambling; T.C.A. § 39-17-1551 provides for preemption of local regulation of tobacco products. Nothing in Chapter 542 suggests that the Tennessee state legislature intended that Chapter 542 preempt local law concerning public nudity. Accordingly, this Court concludes that Chapter 542 does not preclude local regulation of public nudity.

III. Plaintiffs' Motion for Stay Pending Appeal

Pursuant to Rule 62(c) of the Federal Rules of civil Procedure, Nashville Plaintiffs, Memphis Plaintiffs, Chick Plaintiffs, Jackson Tag-Along Plaintiffs, and Chattanooga Plaintiffs have filed motions and supporting memoranda of law requesting this Court to grant a stay pending appeal to the Sixth Circuit. These motions, and Defendants' responses, cite *Hilton v. Braunskill*, 481 U.S. 770 (1987), as establishing the following factors to be considered in determining whether a stay should be granted:

> (1) whether the stay applicant has made a showing that he is likely to succeed on the merits;
>
> (2) whether the applicant will be irreparably injured absent a stay;

(3) whether issuance of the stay will substantially injure the other parties interested in the proceedings; and

(4) whether the granting of the stay would harm or serve the public interest.

Id. at 776. The Sixth Circuit has also applied the Hilton test where parties have moved for a stay. *See Michigan Coalition of Radioactive Material Users v. Griegpenrog*, 945 F.2d 150, 153 (6th Cir. 1991), *rev'd on other grounds*, 954 F.2d 1174 (6th Cir. 1992); *Americans United for Separation of Church and State v. City of Grand Rapids*, 922 F.2d 303, 306, (6th Cir. 1990); *State of Ohio ex rel. Celebrezze v. N.R.C.*, 812 F.2d 288, 290 (6th Cir. 1967).

A. Plaintiffs' Likelihood of Success on Appeal

Following this Court's denial of the Nashville Plaintiffs' Motion for Preliminary Injunction, the Sixth Circuit reversed and remanded the case back to this Court. *Deja Vu et al. v. Metropolitan Government of Nashville and Davidson County*, No. 3-94-MD 1031 (6th Cir. 1996) (not recommended for full-test publication). Without citing specific reasons, the Sixth Circuit concluded this Court had erred in not granting the preliminary injunction, stating that Plaintiffs had "presented sufficient information to demonstrate that a preliminary injunction is warranted."

The parties have filed voluminous information with the Court, including depositions, affidavits, documents, and cross-motions to dismiss and/or for summary judgment. The essential issue before the Court remains the constitutionality of Chapter 542. The Court concluded that no genuine issue of material fact exists to preclude

summary judgment and found that neither Chapter 542 or the Chattanooga city ordinances violate the United States or Tennessee Constitutions. In considering the Plaintiffs' present motion, the Court reaffirms its prior decision and believes Plaintiffs' appeal will fail. Nevertheless, the Court realizes the complexity of law in this area and the divergent opinions surrounding First Amendment speech cases such as the one before the Court. The lack of a bright-line legal demarcation relates to the likelihood of success on the merits in this case. As expressed in the case of *Thomason v. City of Evanston*, 636 F. Supp. 587 (N.D. Ill. 1986):

> The first factor, 'likelihood of success,' presents the most conceptual difficulty. Obviously, we think an appeal will probably fail, we have reviewed our opinion and stand by it. Had we thought an appeal would be successful, we would not have ruled as we did in the first place. But a party seeking a stay need not, show that it is more than 50% likely to succeed on *appeal*, otherwise, no district court would ever grant a stay. It is enough that the [stay applicant] have a substantial case on the merits.

Id. at 590. The Court finds the stay applicants have raised a substantial question on the merits in their appeal. Under the circumstances of this case, this is adequate to meet this first question of Plaintiffs' likelihood of success on the merits.

B. Irreparable Injury to Plaintiffs

As noted in this Court's Memorandum of September 30, 1996, the Supreme Court has recognized nude dancing

as expressive conduct marginally within the perimeters of the First Amendment. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991). "The loss of First Amendment freedoms, for even minimal periods of time unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 377 (1976). The Sixth Circuit has repeatedly followed the *Elrod* language in holding that minimal interference with First Amendment freedoms causes irreparable injury. *See, e.g., G & V Lounge*, 23 F.3d 1071 (6th Cir. 1994); *In re: King World Productions, Inc.*, 898 F.2d 56, 59 (6th Cir. 1990); *Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989).

Since Plaintiffs are engaging in marginally protected First Amendment activity, their right to free expression is violated during the interim if Chapter 542 is enforced now but is ultimately found to be unconstitutional. Thus, they face irreparable injury if Chapter 542 is enforced now, and subsequently is found to be unconstitutional.

C. Injury to Other Interested Parties

Defendants, as well as the public, have an important interest in enforcing the laws passed by the legislature. In considering the relative injury to other interested parties, however, the Court finds that possible confusion and unequal enforcement of the law may result because of different enforcement policies in effect across the state pending the appeal. For example, prior to the Court's decision holding Chapter 542 constitutional, some Defendants voluntarily refrained from enforcing the law until the matter was finally settled, although there was no requirement to do so. There is no way to predict which

law enforcement agencies will enforce the statute and which will wait until the matter is settled on appeal.

Both Plaintiffs and Defendants would suffer losses if Chapter 542 is immediately enforced, and the enforcement policies have to be abandoned later because this Court's decision is overruled. In addition, Defendants apparently have survived over two years without immediate irreparable harm after the Sixth Circuit Court of Appeals directed this Court to issue a preliminary injunction pending a final hearing in this case.

Considering (1) the relative harm being caused by maintaining the status quo, (2) the uncertainty of uniform enforcement of Chapter 542 pending appeal, and (3) the undesirable inconsistencies and harm which would result should the Sixth Circuit ultimately strike this law after enforcement had begun, the Court finds the injury to other interested parties is weighed in favor of Plaintiffs.

D. The Public Interest

As previously stated, Defendants and the public have a strong interest in having this statute enforced. The legislature, as elected representatives of the public, expresses the will of the people. If Chapter 542 is held constitutional on appeal, enjoining its enforcement now "will result in continued harm to the general public and to those individuals who are specifically impacted by the secondary effects of public nudity, including totally nude dancing [as noted in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), by Justice Souter in *Barnes v. Glen Theatres, Inc.*, 501 U.S. 560 (1991), and by the Sixth Circuit in

Triplett Grille, Inc. v. City of Akron, 40 F.3d 129 (6th Cir. 1994)]."

Defendants contend the harms addressed by the Tennessee legislature in enacting Chapter 542 – the harm to morality as a whole and the creation of deleterious secondary effects such as increased crime and decreased property values – are not adequately addressed by the state's other indecent exposure legislation. *See State of Tennessee v. Raggert*, Criminal Court of Shelby County, Nos. 91-4789 and 91-4788 (dismissing indecent exposure indictment against topless dancer as ordinary viewing person in the club would not be offended). Apparently, this lack of remedy was one of the primary reasons for passing Chapter 542.

The public also has an interest in consistent administration of justice and in the predictability of law enforcement. On balance, the Court finds this factor weighs in favor of Defendants.

E. Conclusion

As the District of Columbia Circuit Court of Appeals noted in *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977), "a sliding scale applies to [stay application] analysis." *Id.* at 843. "An order maintaining the status quo is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury on the movant." *Id.* at 844. *See also Rite-Hite Corp. v. Kelly Co., Inc.*, 629 F. Supp. 1042 (E.D. Wis. 1986), *aff'd*, 819

F.2d 1120 (Fed. Cir. 1987); *Providence Journal Co. v. F.B.I.*, 595 F.2d 889 (1st Cir. 1979).

After weighing and balancing the above factors in toto, the Court concludes, under the circumstances of this case, that Plaintiffs are entitled to a preliminary injunction barring the enforcement of Chapter 542 until the Sixth Circuit Court of Appeals reaches a decision on the constitutionality of the statute. Accordingly, the Court grants Plaintiffs' Motion for a stay pending a decision by the Sixth Circuit.

IV. Nashville Plaintiffs' Motion for Relief from Judgment Regarding Amended Complaint

The issues raised by Nashville Plaintiffs' Motion for Relief from Judgment Regarding Amended Complaint (Docket Entry No. 106) are (1) whether Nashville Plaintiffs' Motion to Amend, March 22, 1996, had been withdrawn before this Court's order of September 30, 1996; and, if so, (2) whether Plaintiffs now should be entitled to reinstate their claim for a declaratory judgment as requested in the Amended Complaint.

Nashville Plaintiffs originally filed their complaint in this action on June 14, 1994. On March 22, 1996, these Plaintiffs filed a Motion to Amend that complaint. Shortly thereafter, on April 30, 1996, Plaintiffs withdrew this motion, and simultaneously filed an Amended Complaint. Defendants did not file an answer to Plaintiffs' original Complaint prior to April 30, 1996.

Rule 15(a) of the Federal Rules of Civil Procedure provides that "[a] party may amend the party's pleading

once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served." Under Rule 15(a), Plaintiffs had a right to withdraw their Motion to Amend and to submit an amended complaint on April 30, 1996, without leave of Court. Plaintiffs' amended complaint included a request for Declaratory Judgment that they were exempt from the proscriptions of Chapter 542 because the nude and semi-nude dance entertainment offered in their clubs constituted a theatrical production having serious artistic merit, which is one of the stated exceptions to the prohibitions under the statute. The Court did not specifically address this declaratory judgment request in its order on September 30, 1996.

Because of the above oversight, the Court was technically in error when it ruled in its prior Order (Docket Entry No. 105) that Plaintiffs' Motion to Amend was denied as moot. Such error is a "mistake" under Rule 60(b) (1) of the Federal Rules of Civil Procedure. *See Hopper v. Euclid Nursing Home, Inc.*, 867 F.2d (6th Cir. 1989) ("A claim of strictly legal error falls into the category of 'mistake' under Rule 60(b) (1)").

Rule 60 provides that a court may relieve a party from an order in case of mistake. Rule 61 qualifies Rule 60, and states that "no error or defect in any ruling or order . . . is ground for . . . vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice." For the reasons expressed below, the

Court concludes that Nashville Plaintiffs should be relieved from the Court's earlier judgment dismissing their entire Amended Complaint, and that Plaintiffs should be permitted to reinstate their claim for declaratory relief.

Nashville Plaintiffs seek a declaratory judgment that they fall within the "theatrical production" exception to Chapter 542, and thus cannot be prosecuted for public indecency. According to these Plaintiffs, they would be entitled to an exemption from the prohibitions under Chapter 542 in two situations: (1) if nude dance performances generally were found to be "theatrical productions" with serious artistic merit as provided in Chapter 542(a)(5); or (2) if Nashville Plaintiffs' performances were found to be "theatrical productions" with serious artistic merit as provided in Chapter 542 (a)(5).

1. Nude Dance Performances Generally

The Court previously addressed the question of whether Chapter 542 is constitutional as applied to nude dancing generally. As the Court noted in its Memorandum of September 30, 1996, the Supreme Court found there is no constitutional right to appear nude in public, even when one does so to convey an erotic message through nude dance performance. *Id.* at 13 (citing *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991). The Sixth Circuit also held that a public indecency ordinance as applied to prohibit nude dancing does not violate the First Amendment. *Triplett Grille v. City of Akron*, 40 F.3d 129 (6th Cir.

1994). Accordingly, the Court found Chapter 542 constitutional despite the fact that it was enacted with specific reference to nude dancing. *Memorandum* at 13, 17.[15]

In view of existing law, the Court's analysis of Chapter 542, and its legislative history, it is not reasonable to contend that nude dancing, generally, is to be excepted from the proscriptions of the statute because it is a theatrical performance of serious artistic merit. In fact, the industry is on notice by the legislature that nude dancing in public is among the behavior specifically proscribed and intended to be prosecuted under the statute. Plaintiffs' attempt to obtain a declaratory judgment from this court that nude dancing generally is a theatrical performance of serious artistic merit and constitutes an exception under Chapter 542 is without merit. As such, to the extent the Amended Complaint seeks to state a claim that all nude dancing falls within the "theatrical production" exception to Chapter 542, the Court reaffirms its earlier dismissal of such claim.

2. Nashville Plaintiffs' Performances

Nashville Plaintiffs also wish to reinstate their claim for a declaratory judgment that their particular performances are "theatrical productions" with "serious artistic

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[15] The Court noted, "The preamble to Chapter 542 reflects that the Tennessee legislature enacted the statute in response to [*Barnes v. Glen Theatre*]," *id.* at 13, and "Chapter 542 was designed to address public nudity in general, which necessarily includes nude barroom dancing." *id.* at 17.

merit" within the meaning within the meaning of Chapter 542 (a) (5). The Amended Complaint asserts:

> Plaintiffs Deja Vu of Nashville, Inc., Good Times, Inc., John Christopher Cox, Denise Benson, and Delaina A. Caise, allege that, if Chapter 542 is found not to be impermissibly vague and violative of equal protection in exempting "theatrical productions" which have "serious artistic merit" or for any other reason, then these Plaintiffs are entitled to a Declaratory Judgment holding and declaring that the live nude and semi-nude performance dance entertainment offered by these Plaintiffs constitutes a theatrical production having serious artistic merit, and that, as such, they are exempted from the proscriptions of Chapter 542.

Defendants contend that the above claim is solely based on state law, in that it asks the Court to exempt Plaintiffs' conduct from the statute's coverage. As such, Defendants request that the Court decline to exercise pendent jurisdiction over the claim as a matter of federal-state comity. The Court disagrees.

First, although the language of the above complaint is not entirely clear, the Court finds that it sets forth both state and federal law claims, which claims are virtually indistinguishable. The gravamen of the claim is that Nashville Plaintiffs' conduct cannot, under the First and Fourteenth Amendments, be proscribed by Chapter 542, and thus that Tennessee *must* exempt such conduct from the statute's coverage. Moreover, as discussed in-depth below, the analysis of whether Plaintiffs' expression falls

within the "theatrical production" exception under Tennessee law necessarily involves a federally-based analysis. Thus, this case presents a situation in which "the state claim is so closely tied to questions of federal policy that the argument for exercise of pendent jurisdiction is particularly strong." *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 727 (1966).

Further, the decision regarding whether to exercise pendent jurisdiction should be grounded on "considerations of judicial economy, convenience and fairness to litigants." *Id.* at 726. In this case, the parties have spent more than two and a half years litigating this case in this court. As such, the above factors militate against forcing litigation of the above claim in state court. Thus, the Court finds that it has jurisdiction to hear Plaintiffs' claim.

Nor is abstention from the question of whether Chapter 542 is unconstitutional as applied to Nashville Plaintiffs' conduct appropriate in this case. *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941). Abstention by federal courts is generally only proper in limited circumstances, *see Zwickler v. Koota*, 389 U.S. 241, 248 (1967), and is particularly disfavored in cases involving First Amendment rights. *See id.* at 252 ("to force the plaintiff who has commenced a federal action to suffer the delay of state court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect"); *Dombrowski v. Pfister*, 380 U.S. 479, 489-90 (1965) (holding that abstention is inappropriate in cases where a statute is attacked on its face as violative of the First Amendment). In the present case, piecemeal decision-making regarding the permissible scope of the public

indecency law will certainly cause lengthy delay. The longer the delay in deciding the federal constitutional question presented, the more drastic the chilling effect: those who may wish to engage in expression probably prohibited by the state law will refrain from engaging in such expression pending a decision regarding what conduct is constitutionally proscribable by the law.

Further, the procedural posture of this case, along with considerations of judicial economy and fairness, militate against abstention. This Court has already spent several years considering the issues presented by the parties, and has ruled on the constitutionality of the state law on its face. As noted above, the Court only failed to rule on the current declaratory judgment request as a part of the original summary judgment because of an oversight due to a voluminous record which reflects the initial request was withdrawn, but was later included in the Amended Complaint. Given the time and expense the parties have incurred litigating in this Court, sending them to state court and subjecting them to further delay at this stage would be unfair and inefficient.

Finally, as discussed above, a federal question has been presented along with the state law issue; namely, whether the First Amendment permits Tennessee to prohibit the expressive conduct engaged in by Nashville Plaintiffs. Further, although resolution of the federal question is dependent on a question of state law, even if the Court abstained from the issue, the federal constitutional issues are so closely tied to the state law issue that a federal question could not be avoided.

The "theatrical production" exception states:

> The provisions of this subsection do not apply to any theatrical production which contains nudity as defined by this section performed in a theater by a professional or amateur theatrical or musical company which has serious artistic merit; *provided, that such production is not in violation of chapter 17, part 9 of this title.*

T.C.A. § 39-13-511(a)(5) (emphasis added). Chapter 17, part 9 of Tennessee Code Annotated defines and proscribes "obscenity." Thus, the above language indicates that, to fall under the "theatrical production" exception, the conduct of Nashville Plaintiffs must be (1) a theatrical production performed in a theater; (2) by a professional or amateur theatrical or musical company; (3) which has serious artistic merit; *and* (4) is not "obscene" as defined by chapter 17, part 9. That part of Tennessee Code Annotated provides a definition of "obscenity" that directly quotes the definition set forth by the United States Supreme Court:

> "Obscene" means:
>
> (A) The average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;
>
> (B) The average person applying contemporary community standards would find that the work depicts or describes, in a patently offensive way, sexual conduct; and
>
> (C) The work, taken as a whole, lacks serious literary, artistic, political, or scientific value[.]

T.C.A. § 39-17-901(10). *See State v. Summers*, 692 S.W.2d 439, 445 (Tenn. Crim. App. 1985) (stating that the Tennessee provision was derived from the United States Supreme Court's test for obscenity set forth in *Miller v. California*, 413 U.S. 15 (1973)); *Rhoden v. Morgan*, 863 F. Supp. 612, 617 (M.D. Tenn. 1994) ("It is evident from a plain reading of [T.C.A. § 39-17-901(10)] that the definition of "obscene" follows the standard enunciated in [*Miller*]").

Therefore, in order to determine whether Nashville Plaintiffs' conduct falls within the state statutory exemption, the state court must evaluate such conduct under the federal constitutional standards set forth in *Miller*. This federally-based analysis cannot be avoided since, in order to find that Plaintiffs are exempted from the state law, the state court must make a determination that Plaintiffs' conduct is not "obscene" under the Section 901/*Miller* test.

The Supreme Court has held that abstention is inappropriate where an interpretation of state law will not obviate the need to decide a federal question. As the Court stated in *Harmon v. Forssenius*, 380 U.S. 528 (1965):

> If the state statute in question, although never interpreted by a state tribunal, is not fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question, it is the duty of the federal court to exercise its properly invoked jurisdiction. Thus, "recognition of the role of state courts as the final expositors of state law implies no disregard for the primacy of the federal Judiciary in deciding questions of federal law."

Id. at 534-35 (*quoting England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 415-16 (1964)). *See also Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 237 n.4 (1984) (stating that, where a state constitutional provision parallels a federal constitutional standard, the federal court should not abstain to allow the state court to determine whether there is a violation of the state constitutional provision). Thus, because the state law and federal law questions are conflated in this case, abstention is neither necessary or appropriate.

Defendants additionally contend that the as-applied challenge to Chapter 542 is not ripe for review by the Court. In particular, Defendants note that Nashville Plaintiffs have not been prosecuted under the Tennessee law, and that in Nashville there is currently an order in effect advising against prosecution of nude dancing establishments. As such, Defendants assert that this Court has no constitutional authority to hear Plaintiffs, claim at this time.

In assessing whether a claim is ripe for judicial review, a court first examines the likelihood that the harm alleged by the plaintiff will ever come to pass. *Adult Video Ass'n v. United States Dep't of Justice*, 71 F.3d 563, 568 (6th Cir. 1995) (quoting *United Steelworkers, Local 2116 v. Cyclops Corp.*, 860 F.2d 189, 194 (6th Cir. 1988)). It then considers whether the factual record is sufficiently developed to produce a fair adjudication of the merits of the parties' respective claims. *Id.* Finally, it assesses the hardship to the parties that will result if judicial relief is denied at this stage in the proceedings. *Id.* In cases involving First Amendment rights, a plaintiff need not be actually prosecuted under the state's criminal laws to

bring a suit in federal court for declaratory relief. *Steffel v. Thompson*, 415 U.S. 452, 475 (1974) "[F]ederal declaratory relief is not precluded when no state prosecution is pending and a federal plaintiff demonstrates a genuine threat of enforcement of a disputed state criminal statute, whether the attack is made on the constitutionality of the statute on its face or as applied." *id.*

In the present case, after weighing the above considerations, the Court finds that Nashville Plaintiffs' claim is ripe for adjudication. Although Nashville Plaintiffs have not actually been prosecuted under Chapter 542, the Court finds that a genuine threat of such prosecution exists. The statute has been enforced against similar establishments in other areas of Tennessee, specifically against non-drinking establishments in Memphis, Tennessee. The non-enforcement advisory currently in effect in Nashville is not mandatory, and could be repealed at any time, allowing for prosecution of Nashville Plaintiffs. Because this threat of prosecution is present, Plaintiffs will likely suffer harm in the absence of judicial redress. *Compare Adult Video*, 71 F.3d at 568 (finding unripe a claim by a consortium of adult video distributors that a particular film was not obscene, where the consortium had not even distributed the film in question, and had not been threatened with prosecution under the state's obscenity laws, but merely argued that their expression was chilled because they feared being prosecuted in the event the film was distributed). As such, the Court rejects Defendants' argument that Nashville Plaintiffs' challenge is unripe.

Finally, Defendants contend that, because this Court is sitting as a court of equity in this matter, under Tennessee common law it should refrain from interfering with the enforcement of the state's criminal laws, including Chapter 542. Again, the Court disagrees. Tennessee courts' practice in this regard is irrelevant to the question of whether this Court should exercise jurisdiction over Nashville Plaintiffs, claim. Under Steffel's holding, it is entirely proper, and in some cases imperative, for a federal court to issue a declaratory judgment regarding the constitutionality of a state criminal law affecting First Amendment freedoms. *Steffel*, 415 U.S. at 475. Indeed, the *Steffel* Court noted that a state's concern with interference in the administration of its criminal laws is significantly lessened in cases involving challenges to those laws as applied to particular complainants, such as the present case. *Id.* at 474.

In sum, the Court finds that Nashville Plaintiffs should be relieved from that portion of the Court's earlier judgment dismissing their challenge to Chapter 542 as applied to the claim in their Amended Complaint that the semi-nude dance entertainment offered in their clubs is exempted under the act and T.C.A. § 39-17-901 (10) Accordingly, Nashville Plaintiffs' Motion for Relief from Judgment Regarding Amended Complaint is hereby GRANTED and said claim shall remain.

VI. Memphis Plaintiffs, Motion for Entry of Final Order

Finally, Memphis Plaintiffs have filed a Motion for Entry of Final Order regarding the other motions considered by the Court in this Memorandum. As the Court has already ruled on these motions, Memphis Plaintiffs' Motion is hereby DENIED as MOOT.

V. Conclusion

For the foregoing reasons, the Court finds as follows:

(1) Motion by Chattanooga Plaintiffs to Reconsider (MDL Docket Entry No. 106) is hereby DENIED;

(2) Motion by Chattanooga Plaintiffs for Stay Pending Appeal (MDL Docket Entry No. 106) is hereby GRANTED;

(3) Motion by Nashville Plaintiffs, Memphis Plaintiffs, Chick Plaintiffs, and Jackson Tag-Along Plaintiffs for Stay Pending Appeal (MDL Docket Entry No. 109) is hereby GRANTED;

(4) Motion by Nashville Plaintiffs for Relief from Judgment Regarding Amended Complaint (MDL Docket Entry No. 107) is hereby GRANTED in accord with this opinion. Plaintiffs' claimed exemption under Chapter 542 and T.C.A. § 39-17-901(10) shall remain, but shall not proceed to trial until the Sixth Circuit Court of Appeals rules on the Court's earlier opinion; and

(5) Motion by Memphis Plaintiffs for Entry of Final Order (MDL Docket Entry No. 122) is hereby DENIED as MOOT.

/s/ Robert L. Echols
ROBERT L. ECHOLS
UNITED STATES
DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

IN RE STATE OF	)	MDL Docket No. 1031
TENNESSEE PUBLIC	)	All Cases
INDECENCY STATUTE	)	Judge Echols
LITIGATION,	)	

ORDER

(Docketed July 2, 1997)

Pending before the Court are certain motions filed by some of the Plaintiffs In Re State of Tennessee Public Indecency Statute Litigation (Case No. 3-94-MD-1031). This litigation has been transferred to this Court under 28 U.S.C. § 1407, which provides for consolidation in multi-district litigation. For the reasons discussed in the accompanying Memorandum, the Court finds as follows:

(1) Motion by Chattanooga Plaintiffs to Reconsider (Docket Entry No. 106) is hereby DENIED;

(2) Motion by Chattanooga Plaintiffs for Stay Pending Appeal (Docket Entry No. 106) is hereby GRANTED;

(3) Motion by Nashville Plaintiffs, Memphis Plaintiffs, Chick Plaintiffs, and Jackson Tag-Along Plaintiffs for Stay Pending Appeal (Docket Entry No. 109) is hereby GRANTED;

(4) Motion by Nashville Plaintiffs for Relief from Judgment Regarding Amended Complaint (MDL Docket Entry No. 107) is hereby GRANTED in accord with this opinion. Plaintiffs' claimed exemption under Chapter 542 and T.C.A. § 39-17-901(10) shall remain, but shall not

proceed to trial until the Sixth Circuit Court of Appeals rules on the Court's earlier opinion; and

(5) Motion by Memphis Plaintiffs for Entry of Final Order (Docket Entry No. 122) is hereby DENIED as MOOT.

It is so ORDERED.

/s/ Robert L. Echols
ROBERT L. ECHOLS
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

IN RE STATE OF	)	MDL Docket No. 1031
TENNESSEE PUBLIC	)	All Cases
INDECENCY STATUTE	)	Judge Echols
LITIGATION,	)	

MEMORANDUM

Pending before the Court are a number of summary judgment motions and/or motions to dismiss filed in the original case, *Deja Vu of Nashville, Inc., et al. v. Metropolitan Government of Nashville and Davidson County, Tennessee, et al.*, No. 3-94-0494 (M.D. Tenn. filed June 14, 1994), and in other similar cases which have been transferred to this Court under 28 U.S.C. § 1407, which provides for consolidation in multidistrict litigation. The cases designated for disposition under this multidistrict litigation, together with the pending Motions are listed below:

(1) Motion by Defendants to Dismiss and/or Motion for Summary Judgment (originally filed in case number 3-94-0494, *Deja Vu of Nashville, Inc., et al., v. Metropolitan Government of Nashville and Davidson County, Tennessee, et al.;* Docket Entry No. 30);

(2) Motion by Defendants to Dismiss and/or Motion for Summary Judgment (originally filed in case number 3-94-0571, *James Corbett Chick, d/b/a The Brass Stables, C & A Entertainment, Inc., and Dawn Pierce v. The Metropolitan Government of Nashville Davidson County, Tennessee, and Robert E. Kirchner, Jr.;* Docket Entry No. 18);

(3) Motion by Defendants to Dismiss for Failure to State a Claim or in the Alternative for Summary Judgment (originally filed in case number 3-94-0990, *Steve Cooper, et al. v. City of Memphis, et al.;* Docket Entry No. 0);[1]

(4) Motion by Defendant City of Memphis for Summary Judgment (filed in case number 3-94-MD-1031; Docket Entry No. 26);

(5) Motion by Defendants Weakley County and Sheriff Michael A. Wilson for Summary Judgment (filed in case number 3-94-MD-1031; Docket Entry No. 27);

(6) Motion by Plaintiffs Steve Cooper, Ralph Lunati, Entertainment U.S.A. of Tennessee, Sherrod Jackson, Pure Passion, Inc., and Southern Entertainment Management Co. (collectively referred to as "Memphis Plaintiffs") for Summary Judgment (filed in case number 3-94-MD-1031; Docket Entry No. 35);

(7) Motion by Plaintiffs Deja Vu of Nashville, Inc., John Christopher Cox, Good Times, Inc., Bob Pope, Denise Benson, and Delaina A. Caise (collectively referred to as "Deja Vu Plaintiffs") for Summary Judgment (filed in case number 3-94-MD-1031; Docket Entry No. 40);

(8) Motion by Plaintiffs James Corbett Chick, d/b/a The Brass Rail Stables, C & A Entertainment, Inc., and

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[1] Defendants' Motion was originally filed in the Western District of Tennessee in case number 94-CV-2590. The docket entry number assigned to Defendants' Motion in that case was Docket Entry No. 25.

Dawn Pierce (collectively referred to as "Chick Plaintiffs") for Summary Judgment (filed in case number 3-94-MD-1031; Docket Entry No. 44);

(9) Motion by Plaintiffs James Green, d/b/a Doll House and Lee McDerman, d/b/a Treasures (collectively referred to as "Jackson Tag-Along Plaintiffs") for Summary Judgment (filed in case number 3-94-MD-1031; Docket Entry No. 45);

(10) Motion by Defendants City of Chattanooga, Tennessee; Mayor Gene Roberts; City Council of Chattanooga; Chairperson Mai Bell Hurley; Councilpersons Don Eaves, David Crockett, David Distefano, Yusef Hakeem, John Lively, Leamon Pearce, Marti Rutherford, and Ron Swafford; Chief of Police Ralph Cotran; City Attorney Randall Nelson; Safety Administrator Ervin Dinsmore; and Tennessee Attorney General Charles W. Burson (collectively referred to as "Chattanooga Defendants") to Dismiss (originally filed in case number 3-96-0372; Docket Entry No. 21).

Also pending are the following other Motions in the cases identified:

(1) Motion by Deja Vu Plaintiffs to Amend Complaint (filed, in case number 3-94-MD-1031; Docket Entry No. 70);

(2) Motion by Chick Plaintiffs to Amend Complaint (filed in case number 3-94-MD-1031; Docket Entry No. 76);

(3) Motion by Deja Vu Plaintiffs for Additional Time to File Responsive Affidavit of Dr. Edward Donnerstein

(filed in case number 3-94-MD-1031; Docket Entry No. 79);

(4) Motion by Chick Plaintiffs to Amend Complaint (Chick Plaintiffs' "Second Motion to Amend Complaint") (filed in case number 3-94-MD-1031; Docket Entry No. 84);

(5) Motion by Deja Vu Plaintiffs to Strike and Notice of Objection as to Certain Matter (filed in case number 3-94-MD-1031; Docket Entry No. 71).

I. PARTIES

Plaintiffs are various purveyors of nude and/or semi-nude dancing in Tennessee, either as dancers, managers, or owners of clubs where such dancing occurs. Defendants are various local and state governing bodies and government officials. Plaintiffs challenge the constitutionality of a recent state statute creating a new offense of public indecency, Chapter 542 of the Public Acts of 1994 ("Chapter 542"), under both the Constitution of the State of Tennessee and the United States Constitution.

II. PROCEDURAL HISTORY

The original case was filed by Deja Vu Plaintiffs on June 14, 1994, in the United States District Court for the Middle District Of Tennessee. Deja Vu Plaintiffs first sought a preliminary injunction, seeking to enjoin enforcement of Chapter 542, codified at § 39-13-511 of Tennessee Code Annotated, which became effective on July 1, 1994. This Court denied Plaintiffs' Motion for Preliminary Injunction and Temporary Restraining Order

on July 1, 1994. Deja Vu Plaintiffs filed an appeal of that decision with the United States Court of Appeals for the Sixth Circuit on July 28, 1994. Several other plaintiffs then filed suit in other state and federal courts challenging the constitutionality of Chapter 542 under both the Tennessee and United States Constitutions.

Memphis Plaintiffs filed suit challenging the constitutionality of Chapter 542 on July 1, 1994, in state circuit court in Memphis, Tennessee. The case was removed by Defendants City of Memphis and Melvin E. Bibbs to the United States District Court for Western District of Tennessee on July 21, 1994.

Chick Plaintiffs filed suit on July 11, 1994 in state circuit court in Nashville, Tennessee, seeking to enjoin enforcement of Chapter 542 as violative of both state and federal constitutions. Defendants removed the case to the United States District Court for the Middle District of Tennessee on July 18, 1994. On that same date, Defendants moved to consolidate this case with the case filed by Deja Vu Plaintiffs. On July 19, 1994, Plaintiffs amended their Complaint to delete all references to their federal constitutional claims and moved to remand the case back to state court for adjudication on the remaining state law claims. On July 27, 1994, the Court denied the Plaintiffs' Motion to Remand, finding that it would be more convenient for the defendants and courts involved in these cases for the Court to retain this case and resolve it along with the case filed by Deja Vu Plaintiffs.

On November 2, 1994, the Judicial Panel on Multidistrict Litigation ordered that the case filed by Memphis

Plaintiffs "be transferred to the Middle District of Tennessee and, with consent of that Court, assigned to the Honorable Robert L. Echols for coordinated or consolidated pretrial proceedings" with the case filed by Deja Vu Plaintiffs. *In re State of Tennessee Public Indecency Statute Litigation*, MDL 1031 (J.P.M.L. filed November 8, 1994). The case filed by Chick Plaintiffs was then consolidated with the above multidistrict case ("MDL 1031") as a "tag-along action" on January 5, 1995.

On May 3, 1995, Plaintiff Lee McDerman filed suit against Defendants Weakley County and Michael A. Wilson in the United States District Court for the Western District of Tennessee. On that same date, Jackson Tag-Along Plaintiffs filed suit in the United States District Court for the Western District of Tennessee. By Order of the Judicial Panel on Multidistrict Litigation dated July 17, 1995, those cases were then transferred and filed in the United States District Court for the Middle District of Tennessee and made a part of MDL 1031 on August 2, 1995.

On September 27, 1995, Chattanooga Plaintiffs filed suit in the United States District Court for the Eastern District of Tennessee, seeking to enjoin the enforcement of Chapter 542 and various Chattanooga City Code provisions regulating adult-oriented establishments as violative of the state and federal constitutions. On October 12, 1995, the Honorable R. Allan Edgar denied Chattanooga Plaintiffs' Motion for Preliminary Injunction. The Judicial Panel on Multidistrict Litigation then ordered that the case be transferred to the Middle District of Tennessee and made a part of MDL 1031 on April 11, 1996, for

ruling on the constitutionality of both Chapter 542 and the Chattanooga city ordinances.

On February 6, 1996, the Sixth Circuit rendered its decision on Deja Vu Plaintiffs' appeal of this Court's decision to deny them a preliminary injunction or temporary restraining order. Without elaboration, the Sixth Circuit reversed the decision of this Court, thereby granting Plaintiffs' a preliminary injunction enjoining the enforcement of Chapter 542.

The parties have now filed cross-motions to dismiss and/or for summary judgment.[2] The Court heard oral argument on these motions on March 25, 1996. As matters outside the pleadings, such as affidavits and other documents, have been presented to the Court, the motions will be treated as ones for summary judgment pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

III. TENNESSEE PUBLIC INDECENCY STATUTE

The new Tennessee statute which is the center of this storm of controversy was passed by the state legislature and became effective on July 1, 1994. Chapter 542 amends the Tennessee public indecency statute, which is codified at Section 39-13-511. The statute, as now codified, provides as follows:

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[2] Although the parties have filed their own individual motions, many of them have merely adopted the arguments of their counterparts. Accordingly, this Memorandum will refer to "Plaintiffs" and "Defendants" without delineating the particular plaintiff or defendant that may have first articulated the argument being discussed unless reference to a particular party is necessary for clarity.

(a) (1) (A) A person commits the offense of public indecency who, in a public place, as defined in subsection (a) (2) (B), knowingly or intentionally:

(i) Engages in sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, excretory functions or other ultimate sex acts;

(ii) Appears in a state of nudity; or

(iii) Fondles the genitals of such person or another person.

(B) A person does not violate this subdivision (a) (1) if such person makes intentional and reasonable attempts to conceal such person from public view while performing an excretory function, and such person performs such function in an unincorporated area of the state.

(2) As used in subdivision (a)(1):

(A) "Nudity" or "state of nudity" means the showing of the bare human male or female genitals or pubic area with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of the areola, or the showing of the covered male genitals in a discernibly turgid state. "Nudity" or "state of nudity" does not include a mother in the act of nursing the mother's baby; and

(B) "Public place" means any location frequented by the public, or where the public is present or likely to be present, or where a person may reasonably be expected to be observed by members of the public. "Public

places" include, but are not limited to, streets, sidewalks, parks, beaches, business and commercial establishments (whether for profit or not-for-profit and whether open to the public at large or where entrance is limited by a cover charge or membership requirement), bottle clubs, hotels, motels, restaurants, night clubs, country clubs, cabarets and meeting facilities utilized by any religious, social, fraternal, or similar organizations. Premises used solely as a private residence, whether permanent or temporary, in nature shall not be deemed to be a public place. "Public places" does not include enclosed single sex public restrooms, enclosed single sex functional showers, locker and/or dressing room facilities, enclosed motel rooms and hotel rooms designed and intended for sleeping accommodations, doctors' offices, portions of hospitals and similar places in which nudity or exposure is necessarily and customarily expected outside of the home and the sphere of privacy constitutionally protected therein; nor does it include a person appearing in a state of nudity in a modeling class operated by a proprietary school, licensed by the state of Tennessee, a college, junior college, or university supported entirely or partly by taxation, or a private college or university where such private college or university maintains and operates educational programs in which credits are transferable to a college, junior college, or university supported entirely or partly by taxation or an accredited private college. "Public place" does not include a private

facility which has been formed as a family-oriented clothing optional facility, properly licensed by the state.

(3) Public indecency is punishable as follows:

(A) A first or second offense is a Class B misdemeanor punishable only by a fine of five hundred dollars ($500); and

(B) A third or subsequent offense is a Class A misdemeanor punishable by a fine of one thousand five hundred dollars ($1,500) or confinement for not more than eleven (11) months and twenty-nine (29) days, or both.

(4) (A) If a person is arrested for public indecency while working as an employee or a contractor, the employer or principal may be held liable for a fine imposed by this subsection.

(B) The employer may not be held liable under this section unless it is shown the employer knew or should have known the acts of their employee or contractor were in violation of this statute.[3]

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[3] This subsection was modified slightly by the Code Commission to correct grammatical errors pursuant to Section 1-1-108 of Tennessee Code Annotated. Chapter 542, as passed, provided as follows:

> If a person is arrested for public indecency while working as an employee or a contractor, the employer or principal may he held liable for a fine imposed by this Act.
>
> The employer may not be held liable under this section unless it is shown that the employer knew or

(5) The provisions of this subsection do not apply to any theatrical production which contains nudity as defined by this section performed in a theater by a professional or amateur theatrical or musical company which has serious artistic merit; provided, that such production is not in violation of chapter 17, part 9 of this title.

(6) This subsection shall not affect in any fashion the ability of local jurisdictions or the state of Tennessee to regulate any activity where alcoholic beverages, including malt beverages, are sold for consumption.

(b) (1) A person commits the offense of indecent exposure who, in a public place as defined in § 39-11-106(a)(29)[4] or on the private premises of another, or so near thereto as to be seen from such private premises:

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should have known *of* the acts of their employee or contractor *is* in violation of this statute.

S. 1399, Pub. Chapt. No. 542 of the Pub. Acts of 1994 (emphasis added).

[4] Section 39-11-106(a)(29) provides:

"Public place" means a place to which the public or group of persons has access and includes, but is not limited to, highways, transportation facilities, schools, places of amusement, parks, places of business, playgrounds and hallways, lobbies and other portions of apartment houses and hotels not constituting rooms or apartments designed for actual residence. An act is deemed to occur in a public place if it produces its offensive or proscribed consequences in a public place[.]

Tenn. Code Ann. § 39-11-106(a)(29) (1991).

(A) Intentionally:

(i) Exposes such person's genitals or buttocks to one (1) or more persons; or

(ii) Engages in sexual contact or sexual penetration as defined § 39-13-501; and

(B) Reasonably expects the acts will be viewed by another and such acts:

(i) Will offend an ordinary viewing person; or

(ii) Are for the purpose of sexual arousal and gratification of the defendant.

(2) "Indecent exposure," as defined in subdivision (b) (1), is a Class B misdemeanor, unless the defendant is eighteen (18) years of age or older and the victim is under thirteen (13) years of age, in which event indecent exposure is a Class A misdemeanor.

Tenn. Code Ann. § 39-13-511 (Supp. 1995).

IV. REVERSE SEVERABILITY CLAUSE

It is important to note that Section 4 of Chapter 542 contains what is sometimes referred to as a reverse severability clause. It provides:

> If any provision of this act or the application thereof to any person or circumstance is held invalid, then all provisions and applications of this act are declared to be invalid and void.

S. 1399, Pub. Chapt. No. 542 of the Pub. Acts of 1994.

V. PLAINTIFFS' CONSTITUTIONAL CHALLENGES

Although all of the Plaintiffs do not challenge the constitutionality of Chapter 542 on the same grounds, their challenges may be generally categorized as follows. First, Plaintiffs argue that Chapter 542 violates their First Amendment right to freedom of expression under the United States Constitution. They also contend that Chapter 542 violates an analogous provision of the Tennessee Constitution, guaranteeing the state's citizens free speech. Second, Plaintiffs assert that Chapter 542 violates their rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution as it unfairly targets individuals who wish to assert their fundamental right to express themselves freely by dancing in the nude. Third, they contend that the employer liability provision of Chapter 542 violates the employers' right to due process as it does not properly identify the elements of the crime for which an employer may be held liable because of the actions of his or her employee. Fourth, Plaintiffs have contested the constitutionality of several provisions of Chapter 542 which create exceptions to liability under the Act. In other words, the exceptions recognized in Chapter 542 allow for public nudity in certain situations. Plaintiffs maintain that the exceptions are too vague or overbroad. Lastly, the Chattanooga Plaintiffs also request the Court to strike down the local Chattanooga city ordinances.

VI. SUMMARY JUDGMENT STANDARD

In ruling on a motion for summary judgment, this Court must construe the evidence produced in the light

most favorable to the non-moving party, drawing all justifiable inferences in his or her favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). A party may obtain summary judgment if the evidentiary material on file shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of satisfying the court that the standards of Rule 56 have been met. *See Martin v. Kelley*, 803 F.2d 236, 239 n.4 (6th Cir. 1986). The ultimate question to be addressed is whether there exists any genuine issue of material fact which is disputed. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 248. If so, summary judgment dismissal is inappropriate.

VII. FREEDOM OF EXPRESSION

Plaintiffs first argue that Chapter 542 violates their First Amendment right to freedom of expression as inherent in the right to freedom of speech. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech. . . . " U.S. Const., amend. 1. Plaintiffs assert that Chapter 542 is neither content-neutral nor a law of general applicability. Rather, it is law targeted at businesses that wish to provide adult-oriented entertainment. Plaintiffs contend that, because Chapter 542 is thus content-based, it may be upheld only if it is narrowly tailored to serve a compelling governmental interest through the least restrictive means.

The preamble to Chanter 542 reflects that the Tennessee legislature enacted the statute in response to the Supreme Court opinion in *Barnes v. Glen Theatre, Inc.*, 501

U.S. 560 (1991), in which the Court upheld a similar Indiana statute prohibiting nudity in public places. S. 1399, Pub. Chapt. No. 542 of the Pub. Acts of 1994. The Court in *Barnes* recognized that "nude dancing . . . is expressive conduct within the outer perimeters of the First Amendment, though . . . only marginally so." *Id.* at 566. The plurality opinion[5] then held that this activity, as expressive conduct, was subject to reasonable time, place, and manner restrictions. *Id.* Adopting the test developed in *United States v. O'Brien*, 391 U.S. 367 (1968), the plurality opinion states:

> This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified (1) if it is within the constitutional power of the Government; (2) if it furthers an important or substantial governmental interest; (3) if the governmental interest is unrelated to the suppression of free expression; and (4) if the incidental restriction on alleged First

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[5] The plurality opinion was authored by Chief Justice Rehnquist, joined by Justices O'Connor and Kennedy. Justices Scalia and Souter each wrote separate opinions concurring in the judgment.

> Amendment freedoms is not greater than is essential to the furtherance of that interest.

Barnes, 501 U.S. at 567 (quoting *O'Brien*, 391 U.S. at 376-77 (footnotes omitted)). The Court upheld Indiana's public indecency statute despite its incidental limitations on some expressive activity. *Barnes*, 501 U.S. at 567.

The five Justices who upheld the constitutionality of the Indiana public indecency statute at issue in *Barnes* offered three distinct rationales for doing so. Justice Scalia in a separate concurring opinion concluded that the statute implicated no First Amendment rights and was therefore subject only to the rational basis, which it easily passed. *Id.* at 572-81 (Scalia, J., concurring). The three Justices who joined in the plurality opinion, Justices Rehnquist, O'Connor, and Kennedy, applied the *O'Brien* test and upheld the statute reasoning that the statute was narrowly tailored to achieve the significant governmental interest of "protective societal order and morality." *Id.* at 567 (plurality opinion). Finally, in his concurring opinion, Justice Souter also applied the *O'Brien* test and upheld the statute because the substantial governmental interest at stake was limiting the secondary effects of public nudity, particularly as it arises in the adult-oriented entertainment industry. *Id.* at 580-83 (Souter, J., concurring). All five Justices, however, agreed that the statute was content-neutral, and thus could not trigger a strict scrutiny analysis. *Id.* at 570 (plurality opinion), 576 (Scalia, J., concurring), 582 (Souter, J., concurring).

Despite the holding of the Supreme Court in *Barnes*, Plaintiffs argue that Chapter 542 is distinguishable from the Indiana public indecency statute at issue in *Barnes* as

it is content-based rather than content-neutral, and therefore, this Court must analyze Chapter 542 under a strict scrutiny analysis. "The principal inquiry in determining content-neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 295 (1984)). In conducting this inquiry, courts look first at the face of the statute then at legislative intent. *Congregation Lubavitch v. City of Cincinnati*, 997 F.2d 1160, 1164 (6th Cir. 1993).

Plaintiffs contend that Chapter 542 is not content-neutral on its face because both the preamble and the exceptions listed in Chapter 542 demonstrate that it is targeted at establishments that provide nude dancing entertainment.[6] First, Plaintiffs argue that many sections

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[6] The preamble to Chapter 542 provides:

> WHEREAS, It is a lawful purpose of the General Assembly of the State of Tennessee to enact laws to protect and promote the general welfare, health, safety and morals of its citizens; and
>
> WHEREAS, The General Assembly is empowered to enact such laws pursuant to its charter and the general laws of the State of Tennessee; and
>
> WHEREAS, The Supreme Court of the United States has held that public nudity can be constitutionally proscribed, including so-called nude barroom dancing; and
>
> WHEREAS, The Supreme Court has found that a substantial governmental interest exists in protecting societal order and morality and that because of this

of the preamble to Chapter 542 specifically refer to nude dancing establishments and adult-oriented businesses.

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governmental interest, a law aimed at regulating public conduct, i.e., nudity, is constitutionally permissible despite its incidental impact on nude dancing; and

WHEREAS, The courts have found that nude dancing establishments are frequently used for unlawful sexual activities, including prostitution, and that such activity encourages prostitution, sexual assaults and attracts other criminal activity; and

WHEREAS, There is convincing documented evidence that sexually-oriented businesses including nude dancing establishments, because of their very nature, have a deleterious effect on both the existing businesses around them and the surrounding residential areas adjacent to them, causing increased crime and the downgrading of property values; and

WHEREAS, It is recognized that sexually-oriented businesses including nude dancing establishments have serious objectionable operational characteristics thereby contributing to urban blight and downgrading the quality of life in the adjacent area; and

WHEREAS, The General Assembly desires to minimize and control the above mentioned adverse effects and thereby protect the health, safety, and welfare of the citizenry; protect the citizens from increased crime; preserve the property values and character of surrounding neighborhoods; and deter the spread of urban blight; and

WHEREAS, The purpose or intent of this act is to regulate public conduct and the public commercial exploitation of sex, without any express or implied intent to suppress or prohibit any legitimate speech of expression.

S. 1399, Pub. Chapt. No. 542 of the Pub. Acts of 1994.

Thus, they argue that Chapter 542 was enacted to regulate those businesses in particular rather than public nudity in general.

A fair reading of the preamble to Chapter 542 as a whole, however, reveals that Chapter 542 was designed to address public nudity in general, which necessarily includes nude barroom dancing. In fact, the preamble to Chapter 542 is structured to track the *Barnes* decision, to which it specifically alludes.[7] Its premises encompass both the reasoning of the *Barnes* plurality opinion, which finds protecting societal order and morality a substantial governmental interest, and that of Souter's concurrence, which focuses on the secondary effects of nude dancing. With this language, the legislature has not inappropriately singled out nude dancing for proscription; rather, it has made an express effort to place Chapter 542 within the constitutional parameters established in *Barnes*. Therefore, the Court finds that the preamble to Chapter 542 does not render the Act facially unconstitutional as being content-based; in fact, it supports the Act's constitutionality.

The Court views the exceptions to Chapter 542 as compatible with this result. As noted by this Court in its earlier Opinion entered on July 1, 1994:

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[7] The preamble specifically provides:

> WHEREAS, The Supreme Court of the United States has held that public nudity can be constitutionally proscribed, including so-called nude barroom dancing[.]

S. 1399, Pub. Chapt. No. 542 of the Pub. Acts of 1994.

> The exclusions of modeling classes and for theatrical performances are consistent with the application of the Indiana statute in *Barnes*. In that case, the Court noted that Indiana had not enforced its public indecency law with regard to theatrical performances, ballets, and plays which contained nudity. Though Indiana's exceptions were not codified in the statute and arose through interpretation and application of the Indiana Supreme Court, the result of the lack of enforcement is the same. The Supreme Court, when it addressed the issue of constitutionality of the Indiana statute, did so understanding that the statute had not been applied and enforced against such performances. *See Barnes*, [501 U.S. at 590 (White, J., dissenting)]. Nonetheless, a plurality upheld the constitutionality of the statute as applied.

In fact, the inclusion of the theatrical performances exception may be necessary to avoid possible constitutional violations. *See Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (holding that the denial of the use of a municipal facility for the production of a nude rock musical that the municipal board deemed to be not "in the best interest of the community" constituted a prior restraint in violation of the First Amendment because it did not provide the procedural safeguards necessary to obviate the dangers of censorship); *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129 (6th Cir. 1994) (invalidating statute as overbroad for failure to exempt "high-culture" entertainment from city's public indecency ordinance). Since the Supreme Court's holding in *Barnes*, a number of courts have upheld the constitutionality of public indecency statutes that have similar theatrical performance exceptions. *See, e.g., Cafe 207, Inc. v. St. Johns County*, 856 F. Supp. 641 (M.D. Fla. 1994), *aff'd*, 66 F.3d 272 (11th Cir.

1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 1544 (1996); *Top Shelf v. Mayor & Aldermen for Savannah*, 840 F. Supp. 903 (S.D. Ga. 1993); *S.J.T., Inc. v. Richmond County*, 430 S.E.2d 726 (Ga. 1993), *cert. denied*, 510 U.S. 1011 (1993).

Additionally, the exception for private clothing-optional facilities accords with *Roberts v. Clement*, 252 F. Supp. 835 (E.D. Tenn. 1966), which found a state statute criminalizing "operating a nudist colony" void for vagueness. The language of Chapter 542 avoids the vagueness problem inherent in the statute at issue in *Roberts* through use of the phrase "a private facility which has been formed as a family-oriented clothing-optional facility, properly licensed by the state." Furthermore, it accords with Judge Barr's concurring opinion in *Roberts*, which argued that criminalizing such facilities violates substantive due process.[8] *Id.* at 848 (Barr, J. , concurring) . Thus, the exceptions listed are necessary to accord with the constitutional limits placed on our freedom of expression.

Finally, Plaintiffs' assertion that Chapter 542, on its face, is a content-based regulation of nude barroom dancing is further flawed by the fact that nude barroom dancing is not the only activity prohibited by Chapter 542.

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[8] "The nature of substantive due process is, however, another problem entirely. In this regard I have strong misgivings concerning the Tennessee Nudism Statute and question whether, regardless of the propriety of its grammatical construction, it does not unjustifiably deny liberty by improper encroachment upon the right of privacy and freedom of association."

252 F. Supp. at 846 (Barr, J., concurring).

Clearly, a plethora of unexcepted activities, limited only by the reader's imagination, are also prohibited.

Plaintiffs further argue that legislative intent reveals that Chapter 542 is a content-based statute. *See Church of Lukumi Babalu Ave, Inc. v. City of Hialeah,* 508 U.S. 520 (1993) (holding that a court must look to the historical background of a statute in order to determine its content-neutrality). As evidence of this, Plaintiffs quote various legislators' comments, made in committee and on the floor during legislative debate, which assert that Chapter 542 is designed to apply to the adult entertainment industry. Indeed, this issue was discussed extensively in these arenas. Taken in context, however, the comments show no impermissible targeting of protected speech or conduct; on the contrary, when read in tandem with the full record of legislative history, the comments constitute overwhelming evidence that this bill was enacted as a content-neutral regulation.

The legislative history of Chapter 542 in its entirety reveals that Tennessee's state legislature also intended to address felonious activity including money laundering, tax evasion, drug trafficking, prostitution, and rape; public health concerns including the spread of sexually transmitted diseases; and public welfare concerns including family dissolution, child neglect, the degradation of women, and the spread of urban blight. S. 1399, Pub. Chapt. No. 542 of the Pub. Acts of 1994. Undoubtedly, many of the legislators supported Chapter 542 because they were concerned about the impact of nude dancing on the state of Tennessee. Other legislators, however, apparently were concerned with other effects of public

nudity in general. As the Supreme Court noted in *O'Brien:*

> It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork. We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator had made a "wiser" speech about it.

391 U.S. at 384, *quoted in Barnes*, 501 U.S. at 583 (Souter, J., concurring). Similarly, in finding a county ordinance regulating public nudity constitutional, the United States District Court for the Middle District of Florida stated:

> Our appropriate focus is not an empirical inquiry into the actual intent of the enacting legislature, but rather the existence or not of a current governmental interest in the service of which the challenged application of the statute may be constitutional. It does not matter, therefore, as Plaintiff alleges, that Ordinance 92-12 was specifically aimed by its proponents at Plaintiff's business. It is, on its face, a law of general application to all nudity in public places and the fact – if it is a fact – that the Plaintiff's activities prompted its passage is of no constitutional significance.

Cafe 207, Inc. v. St. John's County, 856 F. Supp. 641, 644 n.3 (M.D. Fla. 1994). Accordingly, the Court finds that Chapter 542 is a content-neutral regulation of public nudity, and therefore is subject to the *O'Brien* test used by the Supreme Court in *Barnes*.

As the Court has found Chapter 542 to be content-neutral, the Court's analysis of this case is controlled by the Supreme Court's decision in *Barnes*. Because *Barnes* produced no single majority opinion, this Court must view the *Barnes* holding as " 'that position taken by those Members who concurred in the judgments on the narrowest grounds. . . . ' " *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15 (1976)). The United States Court of Appeals for the Sixth Circuit held in *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129 (6th Cir. 1994), that Justice Souter's concurrence in *Barnes* provided the narrowest grounds for analyzing the ordinance at issue. *Id.* at 132. *See also SBC Enterprises, Inc. v. City of South Burlington*, 892 F. Supp. 578, 582 (D. Vt. 1995) (agreeing that Justice Souter's concurrence provided the narrowest grounds for analyzing the public indecency statute).

Under Justice Souter's approach, the Court finds that Chapter 542 is valid. Justice Souter, like the plurality, analyzed the Indiana public indecency statute under the *O'Brien* test. The *O'Brien* test, articulated above, provides that a statute will be upheld as constitutional:

> (1) if it is within the constitutional power of the Government; (2) if it furthers an important or substantial governmental interest; (3) if the

> governmental interest is unrelated to the suppression of free expression; and (4) if the incidental restriction on alleged First Amendment freedoms is not greater than is essential to the furtherance of that interest.

O'Brien, 391 U.S. at 376-77. As both the plurality opinion and Justice Souter's concurrence in *Barnes* state, regulating public indecency is clearly "within the constitutional power of the State." *Barnes*, 501 U.S. at 567 (plurality opinion), 583 (Souter, J., concurring). They further agree that the regulation of public nudity easily meets the second prong of the *O'Brien* test, i.e., it furthers an important or substantial governmental interest. *Id.* Justice Souter considered the need to combat the secondary effects of nudity in adult-oriented businesses to be an important or substantial governmental interest. *Id.* at 583-84 (Souter, J., concurring). Likewise, the legislative history of Chapter 542, discussed above, reveals that the Tennessee legislature enacted the statute to address the important or substantial governmental interest of combatting the secondary effects of public nudity, especially in the adult entertainment context.

The third prong of the *O'Brien* test requires the Court to find that the governmental interest in combatting these secondary effects is unrelated to free expression. Justice Souter stated that the governmental interest of combatting secondary effects of nudity in adult-oriented establishments "is unrelated to the suppression of free expression." *Id.* at 586 (Souter, J., concurring). *See also City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (finding that a zoning ordinance regulating adult bookstores did not violate the First Amendment because it

was designed to combat the secondary effects of the location of such businesses rather than regulating the content of the entertainment provided at such establishments). Relying on the language of the preamble, the text, and the legislative history of Chapter 542, Plaintiffs assert that Chapter was designed to suppress the free expression of eroticism. For the reasons discussed above regarding the Court's finding that Chapter 542 is content-neutral, the Court disagrees.

Finally, the fourth prong of the *O'Brien* test requires that the government use the least restrictive means to further its interest. In applying this fourth prong, Justice Souter stated:

> Pasties and a G-string moderate the expression to some degree, to be sure, but only to a degree. Dropping the final stitch is prohibited, but the limitation is minor when measured against the dancer's remaining capacity and opportunity to express the erotic message.

Barnes, 501 U.S. at 587 (Souter, J., concurring). Chapter 542 requires no more tailoring than the Indiana public indecency statute at issue in *Barnes*. Consequently, the Court finds that the incidental restriction on Plaintiffs' First Amendment rights by requiring the citizens of Tennessee who wish to express themselves freely by dancing in the nude to don pasties and a G-string is no greater than necessary to further the important governmental interest of combatting the secondary effects of public nudity.

As the Court has found that Chapter 542 meets all four prongs of the *O'Brien* test, it comports with the

analysis of Justice Souter's opinion in *Barnes*. Accordingly, the Court finds that Chapter 542 does not violate Plaintiffs' right to free expression guaranteed under the First Amendment to the United States Constitution.

VIII. TENNESSEE CONSTITUTION

In addition to their claim under the First Amendment, Plaintiffs have challenged Chapter 542 as violative of Article I, Section 19 of the Tennessee Constitution, which states in part:

> The free communication of thoughts and opinions, is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty.

Tenn. Const. art. I, § 19. Tennessee courts' interpretation of Article 1, Section 19 of the Tennessee Constitution is not bound by the interpretation given to the First Amendment to the United States Constitution. *State v. Marshall*, 859 S.W.2d 289, 294 (Tenn. 1993). There is no indication, however, that the Tennessee Constitution provides more protection for nude dancing as expressive conduct than the United States Constitution provides. Indeed, the Tennessee Supreme Court has adopted the *O'Brien* test in analyzing the regulation of conduct that has both speech and non-speech elements. *H & L Messengers, Inc. v. City of Brentwood*, 577 S.W.2d 444 (Tenn. 1979) (applying the *O'Brien* test to an ordinance governing the delivery and distribution of printed material challenged under the First Amendment to the United States Constitution and

Article I, Section 19 of the Tennessee Constitution). Therefore, the Court finds that the Tennessee Supreme Court would apply the *O'Brien* test as this Court has to an analysis of Chapter 542 under the Tennessee Constitution. Accordingly, the Court finds that Chapter 542 is not violative of Article I, Section 19 of the Tennessee Constitution.

IX. EQUAL PROTECTION CLAUSE

Plaintiffs next assert that Chapter 542 violates their rights guaranteed under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, which provides as follows:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const., amend. XIV, § 1. Plaintiffs argue that Chapter 542 impermissibly discriminates between those who wish to express themselves freely by dancing in the nude at adult-oriented establishments and those who wish to do otherwise. "The Equal Protection Clause directs that 'all persons similarly circumstanced shall be treated alike.' " *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (quoting *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)). In determining whether persons are "similarly circumstanced," "[a] legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns, both public and private, and that account for limitations on the practical ability of the state to remedy every ill." *Plyler*, 457 U.S. at 216. A statute which makes these classifications will not violate the Equal Protection

Clause of the Fourteenth Amendment as long as it does not impermissibly impinge upon a fundamental right or use a suspect classification and it bears a rational relation to a legitimate governmental purpose. *Bery v. City of New York*, 906 F. Supp. 163, 170 (S.D.N.Y. 1995) (holding that a licensing ordinance applied to all vendors except vendors selling newspapers and similar written matter "does not impermissibly impinge upon plaintiffs' First Amendment rights," and therefore, under the rational basis test, does not violate the Equal Protection Clause of the Fourteenth Amendment) (citing *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 547 (1983); *Story v. Green*, 978 F.2d 60, 63-64 (2nd Cir. 1992)).[9]

As noted above, and as the *Barnes* court found with regard to the Indiana public indecency statute, Chapter

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[9] Plaintiffs rely on the holding of the Second Circuit in *Salem Inn, Inc. v. Frank*, 522 F.2d 1045 (2nd Cir. 1975), in which the court applied the strict scrutiny analysis to hold that an ordinance distinguishing between topless dancing in a bar and topless dancing in the "legitimate theater" violated equal protection. As the United States District Court for the Middle District of Florida noted in *Cafe 207, Inc. v. St. John's County*, 856 F. Supp. 641 (M.D. Fla. 1994):

> The [*Salem Inn*] opinion proceeded upon the assumption, however, that nudity in both places enjoyed the same level of First Amendment protection and is now undermined by the Supreme Court's decision in *Barnes*. Moreover, it is difficult to see how an effort to draft distinctions between protected and unprotected forms of speech or expressive conduct required by the First Amendment could, without more, be violative of the equal protection clause of the Fourteenth Amendment.

Id. at 650-51.

542 is a content-neutral statute which does not impermissibly impinge upon Plaintiffs' First Amendment rights. Accordingly, the Court will apply the rational basis test to determine its constitutionality. As the Court's earlier discussion of the legislative history of Chapter 542 makes clear, in enacting this statute, the Tennessee legislature was pursuing the legitimate governmental purpose of controlling the secondary effects associated with public nudity, especially as affiliated with the adult entertainment industry. Clearly, the distinctions drawn in the statute are rationally related toward achieving that legitimate governmental goal. The exceptions noted in the statute encompass only "necessary nudity" as that term is understood,[10] performances of serious artistic merit as legally defined,[11] and family-oriented clothing-optional facilities which previous courts have held enjoy constitutional protection.[12] There is no evidence that the activity protected

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[10] For a list of hypothetical situations that may be described as necessary nudity, see *United States v. Biocic*, 928 F.2d 112, 117 (4th Cir. 1991) (Murnaghan, J., concurring).

[11] The United States Supreme Court has distinguished between artistic works without serious value and those with "serious artistic, political or scientific value." *Miller v. California*, 413 U.S. 15 (1973). The Court recently confirmed the viability of this standard in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 116 S.Ct. 2374 (1996). For cases which exemplify this distinction with regard to public nudity in "legitimate theater" and public nudity in adult-oriented businesses, *see Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), *S.J.T., Inc. v. Richmond County*, 430 S.E.2d 726 (Ga. 1993), *cert. denied*, 510 U.S. 1011 (1993).

[12] *Roberts v. Clement*, 252 F.Supp. 835 (E.D. Tenn. 1966). In his concurrence in *Roberts*, Judge Darr asserts that nudist

by these exceptions produces the secondary effects sought to be avoided by the Tennessee legislature in adopting Chapter 542. Consequently, the Court finds that the inclusion of these exceptions bears a rational relationship to the asserted governmental interest in enacting Chapter 542, and therefore, Chapter 542 does not violate the Equal Protection Clause of the Fourteenth Amendment.

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colonies enjoy constitutional protection under the First and Fourteenth Amendments, noting:

> The matter here for decision is not whether the state can prohibit public nudity, but whether it can prohibit the private, secluded, unobtrusive practice of nudism, without a clear showing that such nudism improperly encroaches upon some other legally protected right.
>
> In order to constitutionally prohibit group association for private action there must be established a strong present public need for such prohibition. *Griswold v. State of Connecticut*, [381 U.S. 479 (1965)]. In other words, to invalidate the Tennessee Nudist statute there must appear a cause 'which is sufficient to justify the deterrent effect . . . (upon) the free exercise by the petitioner's members of their constitutional rights of association.' (citations omitted).

Roberts, 252 F. Supp. at 850 (Darr, J., concurring). He then concludes that "the freedom of association and the right of privacy are each constitutional rights, which, for the purposes of this investigation, are absorbed by the Fourteenth Amendment. *Id.*

X. DUE PROCESS CLAUSE

A. EMPLOYER LIABILITY – SUBSTANTIVE DUE PROCESS

Next, Plaintiffs argue that the employer liability section of Chapter 542 violates the Due Process Clause of the Fourteenth Amendment as it does not clearly indicate all of the elements necessary to hold an employer or principal liable for the conduct of his or her employees or contractors. The statute, as codified, provides as follows: "The employer may not be held liable under this section unless it is shown the employer knew or should have known the acts of their employee or contractor were in violation of this statute." Tenn. Code Ann. § 39-13-511(a)(4)(B). Plaintiffs note, however, that Chapter 542, *as passed*, reads as follows: "The employer may not be held liable under this section unless it is shown that the employer knew or should have known *of* the acts of their employee or contractor *is* in violation of this statute." S. 1399, Pub. Chapt. No. 542 of the Pub. Acts of 1994 (emphasis added). The codified version of the statute reflects changes made by the Code Commission pursuant to Section 1-1-108 of Tennessee Code Annotated in an attempt to repair the grammatical errors contained in the original version of Chapter 542.

Plaintiffs first complain that the Code Commission altered the meaning of the statute by deleting the word "of" and changing the word "is" to "were." They argue that the Code Commission should have left the "of" and deleted the "is." In determining the constitutionality of this provision, however, it is unnecessary to consider the correctness of the changes made by the Code Commission

because the Court must look to the statute as passed rather than as codified in addressing Plaintiffs' attacks on the statute's constitutionality. *United States v. Welden*, 377 U.S. 95, 98 n. 4 (1964); *Marx v. Centran Corp.*, 747 F.2d 1536, 1548 n. 10 (6th Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985); *Lode v. Leonardo*, 557 F. Supp. 675, 677 (N.D. Ill. 1982).

Plaintiffs next assert that the employer liability provision of Chapter 542 violates substantive due process protection in that it does not require that the employer direct or authorize the conduct of the employee nor that the conduct be performed in the scope of employment in order to hold the employer criminally liable. In support of this argument, the Memphis Plaintiffs rely on Volume 22 of CORPUS JURIS SECUNDUM Criminal Law § 131. While that text does note that many states have traditionally required that an employee's conduct be performed in the course of his or her performance and at the direction of his or her employer in order to hold the employer vicariously liable for that conduct, it does not state that the Due Process Clause requires that these criteria be met. In fact, in *United States v. Park*, 421 U.S. 658 (1975), the United States Supreme Court held that an employer may be held vicariously liable by virtue of his relationship to the actor regardless of whether or not he was aware of the actor's wrongdoing. *Id.* at 672-73. The Court grounded the employers' criminal liability in their failure to exercise the authority reposed in them by their supervisory position. *Id.* at 671. *See also United States v. Dotterweich*, 320 U.S. 277, 280-81 (1943); *United States v. Balint*, 258 U.S. 250 (1922).

Furthermore, the Court agrees with Plaintiffs that in order to hold an employer vicariously liable for the conduct of his or her employee that conduct must be performed in the scope of employment. However, it is unnecessary that the statute itself include the phrase "in the scope of employment." Chapter 542 provides: "If a person is arrested for public indecency *while working* as an employee or a contractor, the employer or principal may be held liable for a fine imposed by this subsection." Tenn. Code Ann. § 39-13-511(a)(4)(A) (emphasis added). The Court finds that this language is sufficient to limit the liability of the employer or principal to only those actions of their employees or contractors performed in the scope of employment. This interpretation is consistent not only with the plain language of the statute but also with Tennessee common law which holds that a master will he held liable for the acts of his or her servant only if the servant performs those acts while doing the work of the master. *Hoover Motor Express Co. v. Thomas*, 65 S.W.2d 621, 636 (Tenn. Ct. App. 1933) (citing cases).

Plaintiffs' final complaint regarding the employer liability provision is that, as enacted, it is unconstitutionally vague. Subsection (B) of the employer liability section provides that an employer will be held liable for the conduct of his or her employee if "he knew or should have known of the acts of their employee or contractor is in violation of the statute." While this sentence is clearly grammatically incorrect, the Court finds that it can only reasonably be interpreted to require that an employer know or should know of the conduct of his or her employee in order to be held liable. Thus, the sentence gives fair warning to employers and principals and meets

the standards of fundamental fairness that due process requires. *See Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *Leech v. Am. Booksellers Ass'n, Inc.*, 582 S.W.2d 738, 746 (Tenn. 1979). Accordingly, the Court finds that the employer liability provision of Chapter 542 comports with the requirements of due process.

B. VAGUENESS AND OVERBREADTH

Plaintiffs have also argued that many of the exceptions and definitions in Chapter 542 are unconstitutionally vague and the statute itself is overbroad. Specifically, Plaintiffs have challenged the exceptions and/or definitions of legitimate theatrical performances, modeling classes, family-oriented clothing-optional facilities, public places, and other exceptions and definitions in Chapter 542.

The classic formulation of the test for unconstitutional vagueness is that of Justice Sutherland in *Connally v. Gen. Const. Co.*, 269 U.S. 385 (1926):

> That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

Id. at 391. Regarding the theatrical performance exception, the United States Supreme Court established guidelines under which such productions are to be judged in *Miller v. California*, 413 U.S. 15 (1973), and confirmed the viability of this standard in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, ___ U.S. ___, 116 S. Ct. 2374 (1996).[13] *See also Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); *S.J.T., Inc. v. Richmond County*, 430 S.E.2d 726 (Ga. 1993). Accordingly, the Court finds that there should be no confusion in the minds of the

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[13] In *Denver Area*, the Supreme Court noted that the language of the statute at issue as similar to the language of the California statute adopted by the Court in *Miller v. California*, 413 U.S. 15, 24 (1973), as a "guideline" for identifying materials that states may proscribe as constitutionally obscene. The *Denver Area* Court remarked:

> In *Miller*, the Court defined obscene sexual material (material that lacks First Amendment protection) in terms of
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> > "(a) whether the average person, applying contemporary standards would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."
>
> The language, while vague, attempts to identify the category of materials that Justice Stewart thought [sic] could be described only in terms of "I know it when I see it." *Jacobellis v. Ohio*, 378 U.S. 184, 197, 84 S. Ct. 1676, 1683, 12 L.Ed.2d 793 (1964) (Stewart, J., concurring).

116 S. Ct. 2389-90 (citations omitted) (emphasis deleted).

public or those charged with enforcing the laws in determining what constitutes legitimate theatrical performances.

Plaintiffs also argue that the modeling class exception is vague, pointing out that the statute refers to "modeling classes" rather than a model in an art or drawing class. While the Court agrees that the exception is inartfully worded, the exception refers to such classes operated by defined educational institutions. When the legislative history of Chapter 542 is read in context, the intent of this exception is clear especially when viewed in light of similar public indecency statutes from other states. *See State v. Nelson*, 178 N.W.2d 434, 438 (Iowa 1970) (upholding criminal convictions under a public nudity statute with exceptions for artists' models, patients before doctors and nurses, accidental nudity, etc.), *cert. denied*, 401 U.S. 923 (1971). Thus, the Court finds that the reader should have no confusion regarding who may be excepted from the purview of Chapter 542 under the modeling class exception.

Additionally, Plaintiffs have asserted that the exception provided for family-oriented clothing-optional facilities is unconstitutionally vague. The Court acknowledges the awkwardness of the long phrase which the Tennessee legislature chose for denominating these facilities; it is excused, however, by the fact that such awkwardness is justified by the court's decision in *Roberts v. Clement*, 252 F. Supp. 835 (E.D. Tenn. 1966). There, the court addressed the constitutionality of a statute banning "nudist colonies." The court held that the statute was too vague and indefinite to comply with the due process of law provision of the Fourteenth Amendment to the United States

Constitution and struck it for "lack of appropriate definiteness." *Id.* at 845. As a result, a phrase such as the one used in Chapter 542 is properly descriptive to avoid a vagueness challenge. The Court finds that the phrase used in Chapter 542 is sufficient to fairly apprise the public, law enforcement officials, and members of the judiciary of the legislature's intent.[14]

Plaintiffs next argue that the statute requires that the family-oriented clothing-optional facility be properly licensed by the state in order to be excluded from the Chapter 542's purview. Plaintiffs note, however, that Tennessee has no such licensing requirement for family-oriented clothing-optional facilities, nudist colonies, or other similar facilities. While the Court is also unaware of state regulation of such facilities, inclusion of this requirement does not render the statute void for vagueness or ambiguity. Clearly, the legislature intended to allow existing private family-oriented clothing-optional facilities to continue to operate. Because no licensing requirement is established by the state, one cannot say that such facilities are not properly licensed, and thus in violation of

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[14] Those needing guidance in interpreting the phrase "family-oriented clothing-optional facility" may find Judge Darr's concurrence in *Roberts* instructive:

> [I]n this day people fully understand what a nudist colony is and what a nudist practitioner is. A nudist colony, I think, is generally understood to be a group of people of both sexes who seclude themselves from the public eye and live together without any clothes and that any person who engages in nudist practices is a member of such nudist colony.

252 F. Supp. at 846.

Chapter 542. Furthermore, the inclusion of the requirement that the facility be properly licensed by the state may also be considered proscriptive, such that if Tennessee were to establish such a licensing requirement, these facilities would be on notice that compliance with the licensing requirement is necessary to fall within Chapter 542's exception.

Plaintiffs have also challenged the vagueness of the definition of "public place" found in Chapter 542. For example, Plaintiffs question whether duplexes and apartment buildings would he included within the statutory definition of "public place." The Court finds, however, that Chapter 542 contains a reasonable and adequate definition of a public place, which specifically excludes, among other locations, "premises used solely as a private residence, whether permanent or temporary." In addition, a number of courts have long upheld similar statutes with even less exacting definitions of "public place." In *Hearn v. District of Columbia,* 178 A.2d 434 (D.C. 1962), for example, the Municipal Court of Appeals for the District of Columbia reversed a criminal defendant's conviction for indecent exposure where the defendant had repeatedly stood naked in a hotel window, finding that the defendant's hotel room was not a public place despite the fact that the ordinance did not include an exception for private places, much less an exemption for hotel rooms.[15]

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[15] The court held:

> An exposure becomes indecent when it occurs at such a time and place where a reasonable man knows or should know his act will be open to the cbservation of others. The required criminal intent is usually

Similarly, in *State v. Peery*, 28 N.W.2d 851 (Minn. 1947), the Supreme Court of Minnesota reversed a defendant's conviction for indecent exposure because he was not in a public place. The court held that the defendant's action of walking nude in front of the window in his dormitory room, which was open to view to the adjacent sidewalk, did not constitute a exposure of one's person in a public place. *Id.* at 855.

Chapter 542 exceeds the language of many other public indecency statutes that give no definition of "public place," leaving courts to define it through common law, which has been done. In *Long v. State*, 666 N.E.2d 1258 (Ind. Ct. App. 1996), the Indiana Court of Appeals defined "public place" to be "any place where members of the public are free to go without restraint." *Id.* at 1260.[16] Additionally, the Court in *Borough of Belmar v.*

> established by some action by which a defendant draws attention to his exposed condition or by a display in a place so public that it must be presumed it was intended to be seen by others. However, the defendant must be aware of all those facts which make his conduct criminal. Nudity is not per se 'obscene.' It is not illegal for a man to be completely unclothed in his room. It becomes so only if he intentionally exposes himself to other persons.

Hearn, 178 A.2d at 437 (footnotes omitted). *See also Miller v. Barberton Municipal Court*, 935 F.2d 775 (6th Cir. 1991) (holding that a public indecency statute prohibiting nudity in a place where one is likely to be viewed by others who are not members of his or her household applied to a defendant who swam nude in a local nude swimming club that was hidden by a fence but still somewhat visible to the surrounding neighbors).

[16] The court did note, however, that private areas may exist within a public place, thereby precluding prosecution for public

Buckley, 453 A.2d 910 (N.J. Super. Ct. App. Div. 1982), upheld a conviction under an indecent exposure statute which made it unlawful to appear nude "in any public place," without defining that term. The court found that the ordinance "met constitutional muster since it gave a person of ordinary intelligence fair notice of the nature of the prohibited conduct." *Id.* at 913 (citations omitted). Furthermore, the definition of public place in Chapter 542 notes that the examples of public places given in the definition are intended only to be instructive and not exhaustive. One cannot reasonably expect that every conceivable public place be specifically listed. Thus, the definition leaves room for interpretation, as it must.

Although Plaintiffs have asserted that many other exceptions and definitions in Chapter 542 are unconstitutionally vague and the statute itself is overbroad, and in so doing have proposed a number of hypothetical situations that may or may not fit within these exceptions and definitions, the Court finds that they are sufficiently clear when read in context and readily understood in light of the secondary effects sought to be addressed by the Tennessee legislature.[17] it would be unreasonable, as well as

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indecency. *Long*, 666 N.E.2d at 1261 (citing *Lasko v. State*, 409 N.E.2d 1124 (Ind. Ct. App. 1980) (finding that a locked separate room within a massage parlor was not a public place); *Sweeney v. State*, 486 N.E.2d 651 (Ind. Ct. App. 1985) (finding an enclosed viewing booth was not a public place); *Adims v. State*, 461 N.E.2d 740 (Ind. Ct. App. 1984) (finding a stage with more than one dancer surrounded by six enclosed viewing booths permitting more than one viewer to be a public place)).

[17] Since the Nineteenth Century, American courts have upheld statutes with similar language prohibiting public nudity

undesirable, to draft a statute that attempted to include every conceivable exception necessary to define a public

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despite the fact that this language may leave room for interpretation with respect to accidental and necessary public nudity. *See, e.g., Chubb v. State*, 640 N.E.2d 44 (Ind. 1994) (holding that while a bathroom stall may be considered a private place, once defendant reached over the partition to the adjoining stall to fondle a police officer's genitals it was transformed into a public place); *State v. Baysinger*, 397 N.E.2d 580 (Ind. 1979) (acknowledging the common law history of interpretation given to the definition of "public place") (citing *McJunkins v. State*, 10 Ind. 140 (1858)). In making these determinations regarding the numerous situations in which a violation of a public indecency statute could be found, courts necessarily inject a dose of common sense in their decisions. As Judge Murnaghan noted in his concurrence in *Biocic*:

> Though logic has impelled the prosecution to insist that the law admits of no exceptions, it is literally beyond comprehension to conceive that a mother of a two-year old infant, even on a heavily populated beach would be hauled into federal court for changing a diaper in response to a call of nature. The same thing I daresay would be true in the case of a three-year old openly relieving himself or herself, or a four-year old cavorting stark naked at the water's edge. And what of a woman wearing a one-piece bathing suit who lowers her suit to remove an offending piece of slime from her stomach area? Or a man who, upon viewing no one in the vicinity, finds the lure of the water undeniable, and begins to change into bathing trunks? In its zeal, the prosecution, with a straight face, classifies such hypothetical occurrences as crimes. Criminal "indecency," the language involved, involves concepts of offensiveness and public outrage at the behavior. Only those aspects of public nudity prohibited by the statute which are also "indecent" or "offensive" can be made illegal by the federal

place. It would pose a drafting nightmare which would require continual revision in order to respond to societal changes. The American legal system depends on the common law to adapt our laws to these changes, as well as the judiciary's ability to give sensible construction to the statutes as written.[18] Simply sitting back and imagining

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> regulation. I submit that the above examples could not be so found.

928 F.2d at 117 (Murnaghan, J., concurring).

See also SBC Enterprises, Inc. v. City of South Burlington, 892 F. Supp. 578 (D. Vt. 1995) (upholding constitutionality of statute defining nudity to include covered male genitalia in a discernibly turgid state); *Long v. State*, 666 N.E.2d 1258 (Ind. Ct. App. 1996) (same).

[18] In *Belmar*, the court stated:

> The meaning of portions of the ordinance may be debatable. Nevertheless, we have no doubt that the proscription against "indecent or unnecessary exposure" of the person would unmistakably apprise persons of ordinary intelligence that topless sunbathing on a public beach in the summertime by a female adult lying on her back is prohibited. We recognize that that might not be so in other societies having different mores and customs, but the import and applicability of the prohibition to the conduct here in this societal context is beyond reasonable debate.

453 A.2d at 912.

Similarly, in his concurring opinion in *Biocic*, Judge Murnaghan noted:

> An increasingly large number of persons comprising the body politic does not agree with the definition of indecency. While I have substantial doubts as to how long the almost-everyone-feels-that-way attitude will prevail, bearing in mind how

situations, no matter how illogical or impractical, in which Chapter 542 would be unconstitutional if applied to those facts is not sufficient to succeed on a claim of overbreadth. *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984). The Supreme Court has held that "particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). *See also R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *SBC Enterprises, Inc. v. City of South Burlington*, 892 F. Supp. 578 (D. Vt. 1995). Thus, the Court finds that the exceptions and definitions listed in Chapter 542 are not unconstitutionally vague in violation of the Due Process Clause of the Fourteenth Amendment.

> rapidly the country passed through the era in the 1890s when men first began to swim bare breasted or the demise of the necessity for women to wear stockings and shoes while swimming, I acknowledge that, as of the moment, the predominant belief as to what constitutes propriety and indecency relied on by the majority still endures.

928 F.2d at 116 (Murnaghan, J., concurring).

> The time may well soon come, as it has already with the French and others, when the perceived public sense of outrage will wane. Biocic's action will then be classified as non-criminal, not because it was a bold blow for "liberty," but because it was too trifling – perhaps even childish – a matter for a community to spend time and energy addressing.

Id. at 117.

For the reasons discussed above, the Court finds that Chapter 542 is not violative of the First Amendment, the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment to the United States Constitution or Article I, Section 19 of the Tennessee Constitution. The Court, therefore, declares Chapter 542 to be constitutional. Accordingly, Defendants' Motions to Dismiss and/or for Summary Judgment are hereby granted and Plaintiffs' Motions to Dismiss and/or for Summary Judgment are hereby denied.

XI. CHATTANOOGA CITY ORDINANCES

Finally, the Chattanooga Plaintiffs have challenged the constitutionality of a number of Chattanooga city ordinances regulating activity in adult-oriented businesses. The ordinances of which the Chattanooga Plaintiffs complain read as follows:

> Section 25-84. Indecent exposure.
>
> It shall be unlawful for any person in the city in a public place to engage in the willful and intentional exposure of such person's genitals and buttocks to one (1) or more other persons where the exposing person may reasonably expect his conduct to be viewed by another for the purpose of sexual arousal, gratification or offending the viewing person.
>
> Section 25-85. Lewd and indecent conduct.
>
> (a) Definitions. As used in this section, the following terms shall have the meanings indicated:
>
> *Public place* shall include: streets, sidewalks or highways; transportation facilities;

schools; places of amusement; parks, playgrounds; restaurants; nightclubs; cocktail lounges; burlesque houses; bars; cabarets; taverns; taprooms; private fraternal, social, golf or country clubs; or any place that allows the consumption of intoxicating beverages on the premises.

Wholly or substantially exposed to public view, as it pertains to breasts, shall mean the showing of the female breast, in a public place, with less than a fully opaque covering of any portion of the breast below the top of the nipple.

(b) *Prohibited acts.* it shall be unlawful for any person to perform in a public place, or for any person who owns or operates premises constituting a public place to knowingly permit or allow to be performed therein, any of the following acts or conduct:

(1) The performance of acts or simulated acts of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law;

(2) The actual or simulated touching, caressing or fondling of the breasts, buttocks, anus or genitals in public; or

(3) The actual or simulated public displaying of the pubic hair, anus, vulva or genitals;

(4) The appearance by any female in a public place so costumed or dressed that one or both breasts are wholly or substantially exposed to public view, or any owner

or operator of premises constituting a public place knowingly permitting or allowing any such person to appear on the premises owned or operated by him.

(c) Penalty. Any person violating any of the provisions of this section, upon conviction by the court, may be imprisoned for not more than thirty (30) days, and shall be fined no less than twenty-five dollars ($25.00), nor more than fifty dollars ($50.00) for each violation.

Section 11-434. Responsibilities of the Operator.

(j) A sign shall be conspicuously displayed in the common area of the premises, and shall read as follows:

This Adult-Oriented Establishment is Regulated by Chattanooga City Code, Part II [Chapter 11], Article XV, Sections[s] 11-421 through 11-437. Entertainers Are:

1. Not permitted to engage in any type of sexual conduct;

2. Not permitted to expose their sex organs;

3. Not permitted to demand or collect all or any portion of a fee for entertainment before its completion.

Section 11-435. Prohibitions and unlawful sexual acts.

(c) No operator, entertainer, employee, or customer shall be unclothed or in such attire, costume, or clothing so as to expose to view any portion of the sex organs, breasts or buttocks of said operator, entertainer, or employee with the intent to arouse or gratify the sexual desires of the operator, entertainer, employee, or customer.

The Chattanooga Plaintiffs brought this suit pursuant to 42 U.S.C. 1983, alleging that the above ordinances are facially unconstitutional and as applied to them. Specifically, the Chattanooga Plaintiffs have argued that the ordinances are violative of their First, Fifth, and Fourteenth Amendment rights under the United States Constitution and Article 1, Sections 8 and 19 of the Tennessee Constitution due to their overbreadth and their content-based restrictions.

Most of the Chattanooga Plaintiffs' arguments as they pertain to the city ordinances are the same as those discussed in the previous sections regarding Chapter 542. For the reasons stated above, the Court finds that the Chattanooga city ordinances are likewise constitutional. The city ordinances are content-neutral both on their faces and as applied; therefore, they are not violative of the Chattanooga Plaintiffs' First Amendment right to freedom of expression or Article I, Section 19 of the Tennessee Constitution. Likewise, the Court finds that the Chattanooga city ordinances are not violative of the Equal Protection Clause of the Fourteenth Amendment.

With regard to the Chattanooga Plaintiffs' argument concerning the ordinances' overbreadth, the Court finds instructive the opinion of the Honorable R. Allan Edgar of the United States District Court for the Eastern District of Tennessee. Judge Edgar noted that there was no relevant distinction between Chattanooga City Ordinance Section 25-85 ("Section 25-85") and the statute at issue in *Barnes. DLS, Inc. v. City of Chattanooga*, 914 F. Supp. 193, 196-97 (E.D. Tenn. 1995). He thus concluded, as the *Barnes* Court did, that Section 25-85 is constitutional. *Id.* The

Court agrees with Judge Edgar's assessment and reaches the same result.

Chattanooga Plaintiffs further argue that Section 25-85 is analogous to the statute at issue in *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129 (6th Cir. 1994), which the Sixth Circuit struck down as unconstitutional. In *Triplett Grille*, the court noted the statute could apply to legitimate theater as well as to adult-oriented businesses. Because nudity in legitimate theater enjoys greater constitutional protection than nudity in adult-oriented businesses, the statute, which facially applied to both, was struck down as overbroad. *Id.* at 136. As Judge Edgar pointed out, however, Section 25-85 is unlike the statute at issue in *Triplett Grille* because Section 25-85 had not been construed to include theaters and auditoriums in the definition of "public place."[19] *DLS*, 914 F. Supp. at 196. Furthermore, the Sixth Circuit's decision in *Triplett Grille* is distinguishable from the present case because, like the statute at issue in *Barnes*, to which the Indiana Supreme Court had given a limiting construction, Section 25-85 has been given a limiting construction by the Tennessee

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[19] "[A]t one time the ordinance did include within the definition of a "public place" the terms "theaters" and "auditoriums." After an adverse decision by the Tennessee Court of Appeals in 1978, the City removed this terminology from the ordinance. Therefore, despite the Sixth Circuit's *Triplett* decision, it is clear that § 25-85 is not overbroad."

DLS, Inc. v. City of Chattanooga, 914 F. Supp. 193, 196 (E.D. Tenn. 1995).

Supreme Court.[20] *See Triplett Grille*, 40 F.3d at 136 n.3 (distinguishing the statute at issue in *Barnes* from the Akron statute at issue in *Triplett Grille*). Accordingly, in agreement with Judge Edgar and the Supreme Court's decision in *Barnes*, the Court finds that Section 25-85 is not unconstitutionally overbroad. Therefore, the Court finds the Chattanooga city ordinances to be constitutional.

XII. CONCLUSION

For the foregoing reasons, the Court finds that neither Chapter 542 nor the Chattanooga city ordinances are violative of the First or Fourteenth Amendments to the United States Constitution or Article I, Section 19 of the Tennessee Constitution. As the Court has found both Chapter 542 and the Chattanooga city ordinances to be constitutional under both the United States Constitution and the Tennessee Constitution, all outstanding motions regarding efforts to amend complaints and other ancillary issues are hereby rendered moot. Accordingly, for the reasons stated above, the Court finds as follows:

(1) Motion by Defendants to Dismiss and/or Motion for Summary Judgment (originally filed in case

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[20] In *City of Chattanooga v. McCoy*, 645 S.W.2d 400 (Tenn. 1983), the Tennessee Supreme Court held:

> The obvious thrust of the Chattanooga ordinance is to outlaw nudity and indecent sexual conduct in public without any express or implied intent to suppress or prohibit any legitimate speech or expression entitled to First Amendment protection.

Id. at 403.

number 3-94-0494, *Deja Vu of Nashville, Inc., et al. v. Metropolitan Government of Nashville and Davidson County, Tennessee, et al.*; Docket Entry No. 30) is hereby GRANTED;

(2) Motion by Defendants to Dismiss and/or Motion for Summary Judgment (originally filed in case number 3-94-0571, *James Corbett Chick, d/b/a The Brass Stables, C & A Entertainment, Inc., and Dawn Pierce v. The Metropolitan Government of Nashville Davidson County, Tennessee, and Robert E. Kirchner, Jr.*; Docket Entry No. 18) is hereby GRANTED;

(3) Motion by Defendants to Dismiss for Failure to State a Claim or in the Alternative for Summary Judgment (originally filed in case number 3-94-0990, *Steve Cooper, et al. v. City of Memphis, et al.*; Docket Entry No. 0) is hereby GRANTED;

(4) Motion by Defendant City of Memphis for Summary Judgment (filed in case number 3-94-MD-1031; Docket Entry No. 26) is hereby GRANTED;

(5) Motion by Defendants Weakley County and Sheriff Michael A. Wilson for Summary Judgment (filed in case number 3-94-MD-1031; Docket Entry No. 27) is hereby GRANTED;

(6) Motion by Memphis Plaintiffs for Summary Judgment (filed in case number 3-94-MD-1031; Docket Entry No. 35) is hereby DENIED;

(7) Motion by Deja Vu Plaintiffs for Summary Judgment (filed in case number 3-94-MD-1031; Docket Entry No. 40) is hereby DENIED;

(8) Motion by Chick Plaintiffs for Summary Judgment (filed in case number 3-94-MD-1031; Docket Entry No. 44) is hereby DENIED;

(9) Motion by Jackson Tag-Along Plaintiffs for Summary Judgment (filed in case number 3-94-MD-1031; Docket Entry No. 45) is hereby DENIED;

(10) Motion by Chattanooga Defendants to Dismiss (originally filed in case number 3-96-0372; Docket Entry No. 21) is hereby GRANTED;

(11) Motion by Deja Vu Plaintiffs to Amend Complaint (filed in case number 3-94-MD-1031; Docket Entry No. 70) is hereby DENIED as MOOT;

(12) Motion by Chick Plaintiffs to Amend Complaint (filed in case number 3-94-MD-1031; Docket Entry No. 76) is hereby DENIED as MOOT;

(13) Motion by Deja Vu Plaintiffs for Additional Time to File Responsive Affidavit of Dr. Edward Donnerstein (filed in case number 3-94-MD-1031; Docket Entry No. 79) is hereby DENIED as MOOT;

(14) Motion by Chick Plaintiffs to Amend Complaint (Chick Plaintiffs' "Second Motion to Amend Complaint") (filed in case number 3-94-MD-1031; Docket Entry No. 84) is hereby DENIED as MOOT;

(15) Motion by Deja Vu Plaintiffs to Strike and Notice of Objection as to Certain Matter (filed in case

number 3-94-MD-1031; Docket Entry No. 71) is hereby DENIED as MOOT.

/s/ Robert L. Echols
ROBERT L. ECHOLS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

IN RE STATE OF TENNESSEE PUBLIC INDECENCY STATUTE LITIGATION,	))))	MDL Docket No. 1031 All Cases Judge Echols

ORDER

Pending before the Court are a number of summary judgment motions and/or motions to dismiss filed in the original case, *Deja Vu of Nashville, Inc., et al. v. Metropolitan Government of Nashville and Davidson County, Tennessee, et al.*, No. 3-94-0494 (M.D. Tenn. filed June 14, 1994), and in other similar cases which have been transferred to this Court under 28 U.S.C. § 1407, which provides for consolidation in multidistrict litigation. For the reasons discussed in the accompanying Memorandum, the Court finds as follows:

(1) Motion by Defendants to Dismiss and/or Motion for Summary Judgment (originally filed in case number 3-94-0494, *Deja Vu of Nashville, Inc., et al., v. Metropolitan Government of Nashville and Davidson County, Tennessee, et al.;* Docket Entry No. 30) is hereby GRANTED;

(2) Motion by Defendants to Dismiss and/or Motion for Summary Judgment (originally filed in case number 3-94-0571, *James Corbett Chick, d/b/a The Brass Stables, C & A Entertainment, Inc., and Dawn Pierce v. The*

Metropolitan Government of Nashville Davidson County, Tennessee, and Robert E. Kirchner, Jr.; Docket Entry No. 18) is hereby GRANTED;

(3) Motion by Defendants to Dismiss for Failure to State a Claim or in the Alternative for Summary Judgment (originally filed in case number 3-94-0990, *Steve Cooper, et al. v. City of Memphis, et al.*; Docket Entry No. 0) is hereby GRANTED;

(4) Motion by Defendant City of Memphis for Summary Judgment (filed in case number 3-94-MD-1031; Docket Entry No. 26) is hereby GRANTED;

(5) Motion by Defendants Weakley County and Sheriff Michael A. Wilson for Summary Judgment (filed in case number 3-94-MD-1031; Docket Entry No. 27) is hereby GRANTED;

(6) Motion by Memphis Plaintiffs for Summary Judgment (filed in case number 3-94-MD-1031; Docket Entry No. 35) is hereby DENIED;

(7) Motion by Deja Vu Plaintiffs for Summary Judgment (filed in case number 3-94-MD-1031; Docket Entry No. 40) is hereby DENIED;

(8) Motion by Chick Plaintiffs for Summary Judgment (filed in case number 3-94-MD-1031; Docket Entry No. 44) is hereby DENIED;

(9) Motion by Jackson Tag-Along Plaintiffs for Summary Judgment (filed in case number 3-94-MD-1031; Docket Entry No. 45) is hereby DENIED;

(10) Motion by Chattanooga Defendants to Dismiss (originally filed in case number 3-96-0372; Docket Entry No. 21) is hereby GRANTED;

(11) Motion by Deja Vu Plaintiffs to Amend Complaint (filed in case number 3-94-MD-1031; Docket Entry No. 70) is hereby DENIED as MOOT;

(12) Motion by Chick Plaintiffs to Amend Complaint (filed in case number 3-94-MD-1031; Docket Entry No. 76) is hereby DENIED as MOOT;

(13) Motion by Deja Vu Plaintiffs for Additional Time to File Responsive Affidavit of Dr. Edward Donnerstein (filed in case number 3-94-MD-1031; Docket Entry No. 79) is hereby DENIED as MOOT;

(14) Motion by Chick Plaintiffs to Amend Complaint (Chick Plaintiffs' "Second Motion to Amend Complaint") (filed in case number 3-94-MD-1031; Docket Entry No. 84) is hereby DENIED as MOOT;

(15) Motion by Deja Vu Plaintiffs to Strike and Notice of Objection as to Certain Matter (filed in case number 3-94-MD-1031; Docket Entry No. 71) is hereby DENIED as MOOT.

Accordingly, this case is hereby DISMISSED.

/s/ Robert L. Echols
ROBERT L. ECHOLS
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

IN RE STATE OF	)	**MDL DOCKET NO. 1031**
TENNESSEE PUBLIC	)	**ALL CASES**
INDECENCY STATUTE	)	**JUDGE**
LITIGATION	)	**ROBERT L. ECHOLS**

ORDER

(Docketed Sept. 24, 1996)

The Case Management Conference currently scheduled for Monday, September 30, 1996, at 2:00 p.m. is hereby rescheduled for Monday, October 21, 1996, at 11:00 a.m.

IT IS SO ORDERED.

/s/ Robert L. Echols
ROBERT L. ECHOLS
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

IN RE STATE OF TENNESSEE PUBLIC INDECENCY STATUTE LITIGATION	))))	**MDL DOCKET NO. 1031 ALL CASES JUDGE ROBERT L. ECHOLS**

ORDER

(Docketed Aug. 16, 1996)

The Case Management Conference currently scheduled for Monday, August 26, 1996, at 10:00 p.m. is hereby rescheduled for Monday, September 30, 1996, at 2:00 p.m.

IT IS SO ORDERED.

/s/ Robert L. Echols
ROBERT L. ECHOLS
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

IN RE STATE OF TENNESSEE PUBLIC INDECENCY STATUTE LITIGATION	))))	**MDL DOCKET NO. 1031 ALL CASES JUDGE ROBERT L. ECHOLS**

ORDER

(Docketed July 3, 1996)

Pending before the Court is a Motion by the Chattanooga Plaintiffs in the case of *DLS, Inc., et al v. City of Chattanooga, et al,* Civil Action No. 3:96-0372, for Status Conference/Case Management Conference (Document Entry No. 95). The motion is GRANTED, and a Case Management Conference is hereby scheduled for Monday, August 26, 1996, at 10:00 a.m.

IT IS SO ORDERED.

/s/ Robert L. Echols
ROBERT L. ECHOLS
UNITED STATES
DISTRICT JUDGE

DOCKET NO. 1031

BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE STATE OF TENNESSEE PUBLIC INDECENCY STATUTE LITIGATION

DLS, Inc., et al. v. City of Chattanooga, et al., E.D. Tennessee, C.A. No. 1:95-333

BEFORE JOHN F. NANGLE, CHAIRMAN, ROBERT R. MERHIGE, JR., WILLIAM B. ENRIGHT, CLARENCE A. BRIMMER, JOHN F. GRADY, BAREFOOT SANDERS AND LOUIS C. BECHTLE, JUDGES OF THE PANEL

TRANSFER ORDER

(Filed Apr. 11, 1996)

Presently before the Panel are motions, pursuant to Rule 12, R.P.J.P.M.L., 147 F.R.D. 589, 596 (1993), by the defendants City of Chattanooga (Chattanooga) and the Tennessee Attorney General, to vacate the Panel's order conditionally transferring the entire above-captioned action (*DLS*) to the Middle District of Tennessee for inclusion in the Section 1407 proceedings occurring there in this docket. Defendants ask that claims in *DLS* involving the Tennessee public indecency statute be transferred under Section 1407 to the Middle District of Tennessee for inclusion in Section 1407 proceedings, but that claims involving Chattanooga city ordinances be separated and simultaneously remanded to the Eastern District of Tennessee. Plaintiffs in *DLS* oppose the motion to vacate and favor inclusion of all claims in *DLS* in Section 1407 proceedings.

On the basis of the papers filed and the hearing held, the Panel finds that *DLS* involves common questions of

fact with the actions in this litigation previously transferred to the Middle District of Tennessee, and that transfer of *DLS* to that district for inclusion in the coordinated or consolidated pretrial proceedings occurring there will serve the convenience of the parties and witnesses and promote the just and efficient conduct of this litigation. The Panel further finds that transfer of this action is appropriate for reasons expressed by the Panel in its original order directing centralization in this docket. *See In re State of Tennessee Public Indecency Statute*, MDL-1031 (J.P.M.L. November 2, 1994) (unpublished order).

Although defendants have asked the Panel to separate and simultaneously remand certain claims involving Chattanooga city ordinances to the Eastern District of Tennessee, we point out that transfer under Section 1407 has the salutary effect of placing all actions and claims in this docket before a single judge who can formulate a pretrial program that: 1) allows discovery with respect to any non-common issues to proceed concurrently with discovery on common issues, *In re Joseph F. Smith Patent Litigation*, 407 F. Supp. 1403, 1404 (J.P.M.L. 1976); and 2) ensures that pretrial proceedings will be conducted in a manner leading to the just and expeditious resolution of all actions and claims to the overall benefit of the parties. It may be, on further refinement of the issues and close scrutiny by the transferee judge, that some claims can be remanded in advance of other claims. But we are unwilling, on the basis of the record before us, to make such a determination at this time. Should the transferee judge deem remand of any claims appropriate, procedures are

available whereby this may be accomplished with a minimum of delay. *See* Rule 14, R.P.J.P.M.L., *supra*, 147 F.R.D. at 597-99.

IT IS THEREFORE ORDERED that, pursuant to 28 U.S.C. § 1407, the above-captioned action pending in the Eastern District of Tennessee be, and the same hereby is, transferred to the Middle District of Tennessee and, with the consent of that court, assigned to the Honorable Robert L. Echols for inclusion in the coordinated or consolidated pretrial proceedings occurring there in this docket.

FOR THE PANEL:

/s/ John F. Nangle
John F. Nangle
Chairman

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at CHATTANOOGA

DLS, INC. d/b/a DIAMONDS AND LACE SHOWBAR; ANN MARTIN; RENITA HENEGAR; and MICHELLE MORJAL, *Plaintiffs,*	)	No. 1:95-cv-333 *Edgar / Powers*
v.	)	
CITY OF CHATTANOOGA; and CHARLES W. BURSON, Tennessee Attorney General, *Defendants.*	)	

MEMORANDUM AND ORDER

(Filed May 17, 1996)

This case is before the Court on the plaintiffs' motion (Court File No. 13) to reconsider this Court's decision of October 12, 1996 (Court File Nos. 13, 14) denying the plaintiffs' motion for a preliminary injunction insofar as the plaintiffs sought to enjoin enforcement of CHATTANOOGA CITY CODE § 25-85.

Plaintiffs invite this court to reconsider its decision in light of the unpublished decision of the Sixth Circuit Court of Appeals in *Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville and Davidson County*, 74 F.3d 1240 (table), 1996 WL 11061 (6th Cir. Jan. 10, 1996). In that case the Sixth Circuit reversed the decision of the

United States District Court for the Middle District of Tennessee to deny a preliminary injunction against enforcement of a Tennessee statute, and returned that case to the district court for a trial on the merits.

It should be noted that this Court's decision in the case at bar dealt only with a Chattanooga City Ordinance, not with the state statute. Moreover, this Court fully considered and distinguished *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129 (6th Cir. 1994), which case appears to have motivated the Sixth Circuit in *Deja Vu*. There appears to be no reason for reconsideration of this Court's October 12, 1995 order.

At the time that this Court entered its October decision, it did not address the plaintiffs' challenge to the state statute, Tenn. Code Ann. § 39-13-511, and suggested that the portion of the case relating to that statute be transferred to the Middle District of Tennessee via the Judicial Panel on Multi-District Litigation ("Panel"). However, on April 11, 1996, that Panel entered a transfer order which transferred this entire case, including all matters relating to the Chattanooga City Ordinance, to the Middle District of Tennessee.

Therefore, this Court is presently without jurisdiction to decide the plaintiffs' motion to reconsider. The motion is, therefore, **DENIED.**

SO ORDERED.

ENTER:

/s/ R. Allan Edgar
R. ALLAN EDGAR
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at CHATTANOOGA

DLS, INC. d/b/a DIAMONDS AND LACE SHOWBAR; ANN MARTIN; RENITA HENEGAR; and MICHELLE MORJAL, *Plaintiffs,*	)	No. I:95-cv-333 *Edgar I Powers*
v.	)	
CITY OF CHATTANOOGA; GENE ROBERTS, Mayor; CHATTANOOGA CITY COUNCIL; MAI BELL HURLEY, Chairperson; DON EAVES; DAVID CROCKETT; DAVID DISTEFFANO; YUSEF HAKEEM; JOHN LIVELY; LEAMON PEARCE; MARTI RUTHERFORD; RON SWAFFORD; RALPH COTHRAN, Chief of Police; RANDALL NELSON, City Attorney; ERVIN DINSMORE, Safety Administrator, CHARLES W. BURSON, Tennessee Attorney General, *Defendants.*	)	

MEMORANDUM AND ORDER

(Filed Oct. 12, 1995)

In this case the plaintiffs seek to enjoin the City of Chattanooga and other defendants for enforcing Tenn. Code Ann. § 39-13-511 to prevent the plaintiffs from

furnishing nude dancing. The plaintiffs also seek to enjoin enforcement of several Chattanooga city ordinances which are purported to be applicable. Insofar as this case challenges the Tennessee statute, Tenn. Code Ann. § 39-13-511, it is identical to a number of cases which have already been referred under 28 U.S.C. § 1407 by the Judicial Panel on Multi-District Litigation to the United State District Court for the Middle District of Tennessee for disposition. The portion of this case which involves the Tennessee statute have common issues of law and fact with the cases now pending in the Middle District of Tennessee. It would be the recommendation of this Court that at least this portion of the case be transferred by the Multi-District Panel to the Middle District of Tennessee. Procedurally, however, this will have to be accomplished by an order of the Panel itself under 28 U.S.C. § 1407. This Court will leave it to the parties in this case to take the necessary procedural steps to deal with the question of transfer.

For administrative purposes, plaintiffs' motion for immediate transfer (Court File No. 3) is **DENIED.**

SO ORDERED.

ENTER:

/s/ R. Allan Edgar
R. ALLAN EDGAR
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at CHATTANOOGA

DLS, INC. d/b/a DIAMONDS AND LACE SHOWBARD; ANN MARTIN; RENITA HENEGAR; and MICHELLE MORJAL,	)	
Plaintiffs,	)	No. 1:95-cv-333 *Edgar / Powers*
v.	)	
CITY OF CHATTANOOGA; GENE ROBERTS, Mayor; CHATTANOOGA CITY COUNCIL; MAI BELL HURLEY, Chairperson; DON EAVES; DAVID CROCKETT; DAVID DISTEFFANO; YUSEF HAKEEM; JOHN LIVELY; LEAMON PEARCE; MARTI RUTHERFORD; RON SWAFFORD; RALPH COTHRAN, Chief of Police; RANDALL NELSON, City Attorney; ERVIN DINSMORE, Safety Administrator, CHARLES W. BURSON, Tennessee Attorney General,	)	
Defendants.	)	

MEMORANDUM

(Filed Oct. 12, 1995)

This case is before the Court on the plaintiffs' application for a preliminary injunction against the City of Chattanooga ("City") and the other defendants seeking to enjoin enforcement of CHATTANOOGA CITY CODE §§ 25-84,

25-85, 11-434(j), 11-435(c), and TENN.CODE ANN. § 39-13-511. By separate order entered this date, this Court has made a recommendation that insofar as this case involves a challenge to TENN.CODE ANN. § 39-13-511 the case should be transferred by the Joint Panel on Multi-District Litigation ("Panel") to the United States District Court for the Middle District of Tennessee. Procedurally this transfer will have to be made by an order of the Panel. In anticipation that this transfer will be accomplished, the Court will, therefore, deal only with the remainder of the case as it applies to the above-named Chattanooga city ordinances.

The factors which this Court must consider in determining whether a preliminary injunction should issue are the following: (1) the likelihood of plaintiffs' success on the merits; (2) whether the injunction will save the plaintiffs from irreparable injury; (3) whether the injunction will harm others; and (4) Whether the public interest would be served by the injunction. *In re DeLorean Motor Company*, 755 F.2d 1223, 1228 (6th Cir.1985).

Likelihood of Success on the Merits

The City concedes that its § 25-84 is not directed at nude dancing. Furthermore, § 11-434(j), which only prescribes the contents of signs to be placed in adult-oriented establishments, clearly does itself not prohibit nude dancing. Therefore, the focus must be on the two remaining ordinances.

CHATTANOOGA CITY CODE § 25-85 reads in its entirety:

(a) *Definitions.* As used in this section, the following terms shall have the meanings indicated:

Public place shall include: streets, sidewalks or highways; transportation facilities; schools; places of amusement; parks, playgrounds; restaurants; nightclubs; cocktail lounges; burlesque houses; bars; cabarets; taverns; taprooms; private fraternal, social, golf or country clubs; or any place that allows the consumption of intoxicating beverages on the premises.

Wholly or substantially exposed to public view, as it pertains to breasts, shall mean the showing of the female breast, in a public place, with less than a fully opaque covering of any portion of the breast below the top of the nipple.

(b) *Prohibited acts.* It shall be unlawful for any person to perform in a public place, or for any person who owns or operates premises constituting a public place to knowingly permit or allow to be performed therein, any of the following acts or conduct:

(1) The performance of acts of simulated acts of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law;

(2) The actual or simulated touching, caressing or fondling of the breasts, buttocks, anus or genitals in public; or

(3) The actual or simulated public displaying of the pubic hair, anus, vulva or genitals;

> (4) The appearance by any female in a public place so costumed or dressed that one or both breasts are wholly or substantially exposed to public view, or any owner or operator of premises constituting a public place knowingly permitting or allowing any such person to appear on the premises owned or operated by him.
>
> (c) *Penalty.* Any person violating any of the provisions of this section, upon conviction by the court, may be imprisoned for not more than thirty (30) days, and shall be fined not less than twenty-five dollars ($25.00), nor more than fifty dollars ($50.00) for each violation.

Nude dancing, under legal precedent, is considered to be expressive conduct that is marginally protected by the First Amendment. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-66, 111 S.Ct. 2456, 2460, 115 L.Ed.2d 504, 511 (1991), *Schad v. Mount Ephraim*, 452 U.S. 61, 66 (1981). Unfortunately, the law is not very clear about what should happen when government regulations and First Amendment rights collide over nude dancing. The Supreme Court's decision in *Barnes* contains four separate opinions on the subject. Deriving the significance of the *Barnes* decision is, as the Sixth Circuit recently pointed out, like reading tea leaves. *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 134 (6th Cir.1994). Nonetheless, since Justice Souter's opinion resolved the issue before the Supreme Court on the narrowest grounds, we must look to that opinion for guidance. *Marks v. United States*, 430 U.S. 188, 193 (1976); *Triplett Grille*, 40 F.3d at 133-35.

The result of *Barnes* was that Indiana's public indecency statute does not violate the First Amendment. That

statute does not in any significant way differ from CHATTANOOGA CITY CODE § 25-85. Justice Souter said that the Indiana statute passed the four-part test of *United States v. O'Brien*, 391 U.S. 367 (1968).[1] Justice Souter concluded that the intent of the enacting legislative body is not important; what matters is whether the nude dancing ban addresses a governmental interest. *Barnes*, 115 L.Ed.2d at 522 (Souter, J., concurring). He concluded that nude dancing can be banned since, as a matter of law, such a ban furthers a governmental interest in preventing prostitution, sexual assault and associated crimes. *Id.* at 522-23. He also said that Indiana's nude-dancing ban is unrelated to suppression of free expression and is no greater than is essential to further the governmental interest. *Id.* at 523-25.

The plaintiffs point to the Sixth Circuit's recent decision in *Triplett Grille* and contend that § 25-85 is vague and overbroad. In *Triplett Grille*, the Court of Appeals examined an Akron, Ohio ordinance which, on its face, is identical to the Indiana public indecency statute, and similar to CHATTANOOGA CITY CODE § 25-85. The Court found the Akron ordinance to be overbroad because

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[1] *United States v. O'Brien*, 391 U.S. 367 (1968). That test is that in order to withstand constitutional scrutiny, the ordinance must "(1) be within the constitutional powers of government; (2) further a substantial government interest; (3) the government interest must be unrelated to the suppression of free expression; and (4) the [ordinance] must pose an incidental burden on First Amendment freedoms that is no greater than is essential to further the government interest." *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220, 226 (6th Cir.1995).

> The Akron public indecency ordinance at issue here prohibits all public nudity, including live performances with serious literary, artistic, or political value. The ordinance makes no attempt to regulate only those expressive activities associated with harmful secondary effects and includes no limiting provisions. Instead, Akron's wide ban on public nudity sweeps within its ambit expressive conduct not generally associated with prostitution, sexual assault, or other crimes.

40 F.3d at 136. In short, since the Akron ordinance did not contain an artistic-cultural-political exemption, it was overbroad.

There are several reasons why the *Triplett* analysis does not apply to this case. First, in *Triplett*, the lawmakers testified that the Akron ordinance was intended to reach "all public nudity in Akron, including theatrical performances and barroom dancing." *Id.* at 131. There is no such evidence in this case to date. Second, the *Triplett* court observed that the Akron ordinance was subject to an overbreadth challenge, whereas the Indiana statute in *Barnes* was not. This was because the Indiana statute had been given a limiting construction by the Indiana Supreme Court. *Id.* at 136 n. 3. In similar fashion, CHATTANOOGA CITY CODE § 25-85 has indeed been narrowly construed by the Tennessee Supreme Court. In *City of Chattanooga v. McCoy*, 645 S.W.2d 400 (Tenn.1983), the Tennessee Supreme Court said:

> The obvious thrust of the Chattanooga ordinance is to outlaw nudity and indecent sexual conduct in public without any express or

> implied intent to suppress or prohibit any legitimate speech or expression entitled to First Amendment protection.

Id. at 403. The Tennessee Supreme Court went on to conclude that § 25-85 is not constitutionally overbroad. Thus, it is clear that § 25-85 as construed by the Tennessee Supreme Court does not attempt to regulate nudity in performances which have serious literary, artistic or political value. It is also noteworthy that at one time the ordinance did include within the definition of a "public place" the terms "theaters" and "auditoriums." After an adverse decision by the Tennessee Court of Appeals in 1978, the City removed this terminology from the ordinance. Therefore, despite the Sixth Circuit's *Triplett* decision, it is clear that § 25-85 is not overbroad.

Plaintiffs argue that the challenged city ordinances are pre-empted by the passage of Chapter 542 of the Public Acts of Tennessee 1994 (codified at TENN.CODE ANN. § 39-13-511 (1994)). Plaintiffs base their argument on two cases from the *Supreme Court of Tennessee, Capitol News Co. v. Metropolitan Government of Nashville*, 562 S.W.2d 430 (Tenn.1978), and *City of Bartlett v. Hoover*, 571 S.W.2d 291 (Tenn.1978). Both of these cases are distinguishable on their facts. *Capitol News* involved a conflict between the state obscenity statute, TENN.CODE ANN. § 39-1012, and a local ordinance. *Hoover* involved a conflict between the state gambling statute, TENN.CODE ANN. §§ 6-202, 39-2033(2), 39-2033(4), and a local ordinance. Both cases cite *Southern Ry. v. City of Knoxville*, 223 Tenn. (1 Pack) 90, 442 S.W.2d 619 (1968), for the basic proposition that "[t]he mere fact that the state, in the exercise of the police power, has made certain regulations does

not . . . prohibit a municipality from exacting additional requirements. So long as there is no conflict between the two . . . both will stand. . . . " *Id.* at 622. In *Capitol News*, the Tennessee Supreme Court found no conflict between the state statute and the local ordinance, *Capitol News*, 562 S.W.2d at 434-35, while in *Hoover* the Court did find a conflict, *Hoover*, 571 S.W.2d at 293. The local ordinance in *Capitol News* was allowed to stand, while the ordinance in *Hoover* was found to be pre-empted. It is thus clear that conflict with the law of the state is the key point in an analysis of whether a local ordinance is pre-empted by state law in Tennessee. While TENN.CODE ANN. § 39-13-511 and CHATTANOOGA CITY CODE § 25-85 define "public place" somewhat differently, this does not amount to such a conflict as would nullify the local ordinance. As applied to nude dancing there is no appreciable difference between § 25-85 and the state statute. This is especially so because the Tennessee Supreme Court has narrowly construed the ordinance. As argued by the defendants, and as pointed out in *Capitol News*, 562 S.W.2d at 434-35, the state legislature is capable of declaring its intentions that a particular statute should pre-empt local ordinances. Such a statement of intent is notably absent in TENN.CODE ANN. § 39-13-511.

In sum, there is no reason why the result of plaintiffs' legal challenge to CHATTANOOGA CITY CODE § 25-85 should be any different from the result reached on the Indiana public indecency statute by the United States Supreme Court in *Barnes*. It is not pre-empted by state legislation. As to this particular ordinance, therefore, it is not likely that plaintiffs' legal claim will succeed on the merits.

The other ordinance involved here, CHATTANOOGA CITY CODE § 11-435(c), presents a different picture. This provision, which is a part of Chattanooga' adult-oriented establishment ordinance, reads as follows:

> No operator, entertainer, employee, or customer shall be unclothed or in such attire, costume, or clothing so as to expose to view any portion of the sex organs, breasts or buttocks of said operator, entertainer, or employee with the intent to arouse or gratify the sexual desires of the operator, entertainer, employee, or customer.

It will be noted that this ordinance does not strictly prohibit nude dancing – or even public nudity. To violate this ordinance one has to either dress, or undress, in such a way within an adult-oriented establishment as to evince an intent to arouse one's own sexual desires or those of someone else. The meaning and significance of this provision is somewhat Delphic. This ordinance does not provide fair notice of what is proscribed to those who must obey it, and is therefore void for vagueness. *See Columbia Natural Resources, Inc. v. Tatum*, 58 F.3d 1101, 1104-05 (6th Cir.1995).

Moreover, this ordinance does not purport to prohibit conduct which is only public. It could be construed to prohibit privately conducted attempted masturbation at an adult-oriented establishment. Thus, it is likely that this provision would be found to be overbroad as not having been tailored to address secondary effects associated with publicly-conducted nude dancing. Another district court has held that a nearly identical ordinance provision flunks the *O'Brien* test. *Ellwest Stereo Theater, Inc. v. Boner*, 718 F.Supp. 1553, 1579-80 (M.D.Tenn.1989).

The Remaining Preliminary Injunction Factors

A. CHATTANOOGA CITY CODE § 25-85

Since this Court has preliminarily determined that CHATTANOOGA CITY CODE § 25-85 is not facially unconstitutional, the plaintiffs cannot show that they would suffer irreparable harm by its enforcement. If plaintiffs' First Amendment rights were violated here, irreparable harm would occur. However, the Court has determined that this is not likely to be the case. Finally, the public is served by the enforcement of valid laws. Since this Court has preliminarily determined that the law is valid, the public interest is served by denial of the preliminary injunction as to § 25-85.

B. CHATTANOOGA CITY CODE § 11-435(c)

One suffers injury when one's First Amendment rights are violated. *Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir.1989). Granting a preliminary injunction would not harm others in this instance. If the harm is the secondary effects of nude dancing, the City may counter those with the enforcement of CHATTANOOGA CITY CODE § 25-85. Finally, the public interest will be served by preventing further litigation over an ordinance which is unclear in its meaning and scope.

It should be emphasized that this Court has not decided, nor is it the role of this Court to decide, whether nude dancing is good or bad. That decision rests with the Chattanooga City Council. This Court has only decided that under the law as it exists today, the plaintiffs are not

likely to succeed on their claim that the City cannot, if it wishes, prohibit nude dancing.

An order will enter.

/s/ R. Allan Edgar
R. ALLAN EDGAR
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at CHATTANOOGA

DLS, INC. d/b/a DIAMONDS AND LACE SHOWBARD; ANN MARTIN; RENITA HENEGAR; and MICHELLE MORJAL,	)	
Plaintiffs,	)	
v.	)	No. 1:95-cv-333
CITY OF CHATTANOOGA; GENE ROBERTS, Mayor; CHATTANOOGA CITY COUNCIL; MAI BELL HURLEY, Chairperson; DON EAVES; DAVID CROCKETT; DAVID DISTEFFANO; YUSEF HAKEEM; JOHN LIVELY; LEAMON PEARCE; MARTI RUTHERFORD; RON SWAFFORD; RALPH COTHRAN, Chief of Police; RANDALL NELSON, City Attorney; ERVIN DINSMORE, Safety Administrator, CHARLES W. BURSON, Tennessee Attorney General,	)	*Edgar / Powers*
Defendants.	)	

ORDER

(Filed Oct. 12, 1995)

For the reasons expressed in the Court's memorandum filed herewith, plaintiffs' motion for a preliminary injunction (Court File No. 2) is **DENIED** insofar as it seeks to enjoin enforcement of CHATTANOOGA CITY CODE

§ 25-85. Plaintiffs' motion is **GRANTED** as to CHATTANOOGA CITY CODE § 11-435(c) and the defendants are hereby **ENJOINED** from enforcing that ordinance provision.

SO ORDERED.

ENTER:

/s/ R. Allan Edgar
R. ALLAN EDGAR
UNITED STATES DISTRICT JUDGE

96-6512/6573/97-5924/5938

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: STATE OF TENNESSEE PUBLIC INDECENCY STATUTE. DEJA VU, ET AL.	)	
Plaintiffs-Appellants,	)	ORDER
v.	)	
METRO GOVERNMENT, ET AL.,	)	
Defendants-Appellees.	)	(Filed Mar. 18, 1999)

BEFORE: MARTIN, Chief Judge; NORRIS and BATCHELDER, Circuit Judges.

The court having received three petitions for rehearing en banc, and the petitions having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petitions for rehearing have been referred to the original panel.

The panel has further reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the case. Accordingly, the petitions are denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

Tennessee Public Decency Statutes

39-13-511. Public indecency – Indecent exposure. – (a)(1)(A) A person commits the offense of public indecency who, in a public place, as defined in subdivision (a)(2)(B), knowingly or intentionally:

(i) Engages in sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, excretory functions or other ultimate sex acts;

(ii) Appears in a state of nudity; or

(iii) Fondles the genitals of such person, or another person.

(B) A person does not violate this subdivision (a)(I) if such person makes intentional and reasonable attempts to conceal such person from public view while performing an excretory function, and such person performs such function in an unincorporated area of the state.

(2) As used in subdivision (a)(1):

(A) "Nudity" or "state of nudity" means the showing of the bare human male or female genitals or pubic area with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of the areola, or the showing of the covered male genitals in a discernibly turgid state. "Nudity" or "state of nudity" does not include a mother in the act of nursing the mother's baby; and

(B) "Public place" means any location frequented by the public, or where the public is present or likely to be present, or where a person may reasonably be expected to be observed by members of the public. "Public places"

includes, but is not limited to, streets, sidewalks, parks, beaches, business and commercial establishment (whether for profit or not-for-profit and whether open to the public at large or where entrance is limited by a cover charge or membership requirement), bottle clubs, hotels, motels, restaurants, night clubs, country clubs, cabarets and meeting facilities utilized by any religious, social, fraternal or similar organizations. Premises used solely as a private residence, whether permanent or temporary in nature, are not deemed to be a public place. "Public places" does not include enclosed single sex public restrooms, enclosed single sex functional showers, locker and/or dressing room facilities, enclosed motel rooms and hotel rooms designed and intended for sleeping accommodations, doctors' offices, portions of hospitals and similar places in which nudity or exposure in necessarily and customarily expected outside of the home and the sphere of privacy constitutionally protected therein; nor does it include a person appearing in a state of nudity in a modeling class operated by a proprietary school, licensed by the state of Tennessee, a college, junior college, or university supported entirely or partly by taxation, or a private college or university where such private college or university maintains and operates educational programs in which credits are transferable to a college, junior college, or university supported entirely or partly by taxation or an accredited private college. "Public place" does not include a private facility which has been formed as a family-oriented clothing optional facility, properly licensed by the state.

(3) Public indecency is punishable as follows:

(A) A first or second offense is a Class B misdemeanor punishable only by a fine of five hundred dollars ($500); and

(B) A third or subsequent offense is a Class A misdemeanor punishable by a fine of one thousand five hundred dollars ($1,500) or confinement for not more than eleven (11) months and twenty-nine (29) days, or both.

(4)(A) If a person is arrested for public indecency while working as an employee or a contractor, the employer or principal may be held liable for a fine imposed by this subsection.

(B) The employer may not be held liable under this section unless it is shown the employer knew or should have known the acts of the employee or contractor were in violation of this statute.

(5) The provisions of this subsection do not apply to any theatrical production which contains nudity as defined by this section performed in a theater by a professional or amateur theatrical or musical company which has serious artistic merit; provided, that such production is not in violation of chapter 17, part 9 of this title.

(6) This subsection shall not affect in any fashion the ability of local jurisdictions or the state of Tennessee to regulate any activity where alcoholic beverages, including malt beverages, are sold for consumption.

(b)(1) A person commits the offense of indecent exposure who, in a public place as defined in § 39-11-106

or on the private premises of another, or so near thereto as to be seen from such private premises:

(A) Intentionally:

(i) Exposes such person's genitals or buttocks to one (1) or more persons; or

(ii) Engages in sexual contact or sexual penetration as defined in § 39-13-501; and

(B) Reasonably expects the acts will be viewed by another and such acts;

(i) Will offend an ordinary viewing person; or

(ii) Are for the purpose of sexual arousal and gratification of the defendant.

(2) "Indecent exposure," as defined in subdivision (b)(1), is a Class B misdemeanor, unless the defendant is eighteen (18) years of age or older and the victim is under thirteen (13) years of age, in which event indecent exposure is a Class A misdemeanor. Additionally, "indecent exposure," as defined in subdivision (b)(1), is a Class E felony when the defendant is eighteen (18) years of age or older, the victim is under thirteen (13) years of age, and the defendant has any combination of two (2) or more prior convictions under this section. [Acts 1989, ch. 591, § 1; 1190 ch. 980, § 33; 1994, ch. 542, §§ 1-3; 1998, ch. 755, § 1.]

CHATTANOOGA CITY CODE

Chapter 11

Sec. 11-435. Prohibitions and unlawful sexual acts.

(a) No operator, entertainer, or employee of an adult-oriented establishment shall permit to be performed, offer to perform, perform or allow customers, employees or entertainers to perform sexual intercourse or oral or anal copulation or other contact stimulation of the genitalia.

(b) No operator, entertainer, or employee shall encourage or permit any person upon the premises to touch, caress, or fondle the breasts, buttocks, anus or genitals of any other person.

(c) No operator, entertainer, employee, or customer shall be unclothed or in such attire, costume, or clothing so as to expose to view any portion of the sex organs, breasts or buttocks, of said operator, entertainer, or employee with the intent to arouse or gratify the sexual desires of the operator, entertainer, employee, or customer.

(d) No entertainer, employee or customer shall be permitted to have any physical contact with any other on the premises during any performance and all performances shall only occur upon a stage at least eighteen inches (18") above the immediate floor level and removed at least six feet (6') from the nearest entertainer, employee and/or customer.

(Code 1986, § 11-435; Ord. No. 10178, §§ 3-4, 3-7-95)

Sec. 25-85. Lewd and indecent conduct.

(a) *Definitions.* As used in this section, the following terms shall have the meanings indicated:

Public Place shall include: streets, sidewalks or highways: transportation facilities; schools; places of amusement; parks, playgrounds; restaurants; nightclubs; cocktail lounges; burlesque houses; bars; cabarets; taverns; taprooms; private fraternal, social, golf or country clubs; or any place that allows the consumption of intoxicating beverages on the premises.

Wholly or substantially exposed to public view, as it pertains to breasts, shall mean the showing of the female breast, in a public place, with less than a fully opaque covering of any portion of the breast below the top of the nipple.

(b) *Prohibited acts.* It shall be unlawful for any person to perform in a public place, or for any person who owns or operates premises constituting a public place to knowingly permit or allow to be performed therein, any of the following acts or conduct:

(1) The performance of acts or simulated acts of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law;

(2) The actual or simulated touching, caressing or fondling of the breasts, buttocks, anus or genitals in public; or

(3) The actual or simulated public displaying of the pubic hair, anus, vulva or genitals;

(4) The appearance by any female in a public place so costumed or dressed that one or

both breasts are wholly or substantially exposed to public view, or any owner or operator of premises constituting a public place knowingly permitting or allowing any such person to appear on the premises owned or operated by him.

(c) *Penalty.* Any person violating any of the provisions of this section, upon conviction by the court, may be imprisoned for not more than thirty (30) days, and shall be fined not less than twenty-five dollars ($25.00), nor more than fifty dollars ($50.00) for each violation.

(Code 1986, § 25-85)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
CHATTANOOGA DIVISION

D.L.S., INC. d/b/a DIAMONDS AND LACE SHOWBAR, a Tennessee Corporation; ANN MARTIN; RENITA HENEGAR; and MICHELLE MORJAL,	*	NO. 1:95-cv-333 Edgar
Plaintiffs	*	Judge _____
vs.	*	
CITY OF CHATTANOOGA, TENNESSEE; MAYOR GENE ROBERTS; CITY COUNCIL OF CHATTANOOGA; CHAIRPERSON MAJ BELL HURLEY; COUNCILPERSONS DON EAVES, DAVID CROCKETT, DAVID DISTEFFANO, YUSEFF HAKEEM, JOHN LIVELY, LEAMON PEARCE, MARTI RUTHERFORD, and RON SWAFFORD; CHIEF OF POLICE RALPH COTHRAN; CITY ATTORNEY RANDALL NELSON; SAFETY ADMINISTRATOR ERVIN DINSMORE; and TENNESSEE ATTORNEY GENERAL CHARLES W. BURSON,	*	
Defendants.	*	

PLAINTIFFS' MOTION FOR IMMEDIATE TRANSFER

Come now the plaintiffs, by and through counsel, pursuant to 28 U.S.C. § 1407(a) and move this Honorable Court to immediately transfer this case to the United States District Court for the Middle District of Tennessee, Nashville Division, after ruling on the Plaintiffs' Motion for Temporary Restraining Order and a Preliminary Injunction. In support of this motion, the plaintiffs state the following:

That the defendant, City of Chattanooga, through its legal counsel, in prior litigation in this matter which is pending in the Sixth Circuit Court of Appeals stated that the purpose of the Adult-Oriented Establishment ordinance (codified at City Code sections 11-421 through 11-437) was not to regulate nudity.

Since the City of Chattanooga has the option of prosecuting the plaintiffs under the provisions of T.C.A. § 39-13-511 (Tennessee Public Indecency Statute), the attached documents clearly indicate that this is a "tag-along" case and is controlled by the orders of the pending litigation in the case of In Re State of Tennessee Public Indecency Statute Litigation, M.D.L. docket number 1031, in the United States District Court for the Middle District of Tennessee at Nashville which are attached as an exhibit.

WHEREFORE, for the reasons set forth in this motion and for the reasons set forth in the plaintiffs' complaint filed with this motion, the plaintiffs respectfully request this Honorable Court to transfer this case to the United States District Court for the Middle District of Tennessee,

Nashville Division, after ruling on the Plaintiffs' Motion for Temporary Restraining Order and a Preliminary Injunction.

Respectfully submitted:

SUMMERS, MCCREA &
WYATT, P.C.

By: /s/ Jerry H. Summers
Jerry H. Summers
TN BPR#534

By: /s/ Jimmy F. Rodgers, Jr.
Jimmy F. Rodgers, Jr.
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Attorneys for the plaintiffs